1 In the Court of Claims.

JOHN R. GLEASON AND GEORGE W. GOSNELL, plaintiffs,
vs.
THE UNITED STATES, DEFENDANTS. } No. 17782.

I.—*Petition.—Filed October 25, 1892.*

To the honorable the judges of the Court of Claims:

The petition of John R. Gleason and George W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, residents of Louisville, in the State of Kentucky, and citizens of the United States, respectfully represents:

I. That a contract under seal was made by plaintiffs as parties of the second part with Lieutenant-Colonel William E. Merrill, Corps of Engineers, United States Army, acting for and in behalf of the United States, party of the first part, and signed and delivered by the parties thereto August 4, 1885, and approved by the Chief of Engineers of the United States Army August 14, 1885, copy of which is hereto attached, marked "Exhibit A," and prayed to be taken as a part of this petition.

II. That by this contract the plaintiffs contracted with the United States to perform certain public work for the defendant, namely:

2 One hundred and ten thousand (110,000) cubic yards of rock excavation, to be performed by the plaintiffs in the enlargement of the Louisville and Portland Canal at Louisville, Kentucky, such excavation being a portion of the area included between the guiding dike, the cross dam as it was at that time, and the cross dam as it was to be when the proposed improvements were completed. For this work the plaintiffs were to receive eighty-five cents (85 cents) per cubic yard, and all material excavated was to be the property of the plaintiffs.

III. That on January 21, 1887, a supplemental contract was entered into between Major Amos Stickney, acting for and in behalf of the United States as a party of the first part, and the plaintiffs as parties of the second part, by which supplemental contract the time for completing the said work was extended till December 31, 1887, and by which plaintiffs undertook certain conditions of work. A copy of this contract is hereto attached, marked "Exhibit B," and is prayed to be taken as a part of this petition.

IV. That on the account of scarcity of labor, and excessive heat of the summer season of 1887, and for other good and sufficient reasons, the plaintiffs requested, in the latter part of the year 1887, and requested in writing on December 31, 1887, that the time for completing the contract be extended to December 31, 1888, and, at the dictation of the said Major Amos Stickney, proposed certain conditions as to work. This request was granted January 9, 1888, by the said Major Amos Stickney. Copies of said request and reply are hereto attached, marked, respectively, "Exhibit C" and "Exhibit D," and made a part hereof.

V. That by this allowance of additional time and extension of

3 the contract the rights and obligations of the parties thereto subsisted, took effect, and were enforcible precisely as if the new

date for the completion of the contract had been the date originally therein agreed upon.

VI. That the said contract contains the following provisions:

"If the party (or parties) of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault o' his or their own, be prevented from either commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

The advertisements and specifications of the United States inviting bids for the contract, and which, by the terms of the contract, are a part thereof, also contained a promise to the same effect, namely:

"9. The general form of contracts made under authority of the War Department provides that additional time may be allowed to a contractor for beginning or completing his work in cases of delay from 'freshets, ice, or other force or violence of the elements, and by no fault of his or their own.'"

VII. That the Louisville and Portland Canal begins on the Kentucky side of the Ohio River, at the head of the falls, and where the current is extremely swift. The fall is about 13½ feet in the mile, consequently a slight rise adds enormously to the force of the current.

4 The excavation to be done on the work was in the natural bed of the river, where it was formerly exposed only in extremely low water, when the canal on the south side and the narrow channel, or "Indian chute," on the extreme north side were able to accommodate the entire volume of the Ohio. Shortly after the war the United States Government constructed a timber dam extending across the middle portion of the river bed, in order to force the river to flow through the canal and Indian chute.

This dam was five feet high—that is to say, it excluded five feet of water—and was designed, and was effectual, to keep the rock bed where the work was to be done exposed at all normal stages of the river, and its existence permitted drilling, blasting, and excavating to be done in the river bed, and enabled the contract to be undertaken by the plaintiffs, and the plaintiffs aver that the specifications of the United States upon which they made their bid and which form a part of the contract particularly located with reference to said dam the work to be done, and they undertook the contract, relying upon the existence and efficient character of the said Government dam.

VIII. That immediately after the letting of the contract to the plaintiffs, in August, 1885, they began active preparations for the work, building an incline, including engine and hoisting apparatus, and railroad, and procuring carts and drills and other implements and materials, in and for which preparations, implements, and materials they expended large sums of money.

At that time the height of the river prevented the beginning of active work on the excavation.

In or about September, 1885, the said Colonel Wm. E. Merrill, the United States engineer, acting as the officer and agent of the defendant, ordered the plaintiffs to construct a timber dam extending from
5 the extreme southern and western point of their work parallel with the canal to the water gate, and thence north across the river to the cement quarry dam of Speed & Co., which it joined. This dam the plaintiffs built under the direction of said Merrill, the United States engineer in charge of the work. It was of such height as to keep out five feet of water, which the said engineer said was high enough, but this dam was afterwards raised about a foot by plaintiffs.

IX. That usually there is steady low water in the Ohio River at this point during the greater part of the summer and through the fall, during which time such work as that for which plaintiffs contracted could be carried on without interruption. But the year 1888 was a decided exception to this rule. During that year, for which the contract was extended and renewed, as aforesaid, the freshets in the river and the force and violence of the elements were such that the work was repeatedly flooded, damaging and delaying plaintiffs in their excavations, and for long periods of time completely putting a stop to their operations. From January 1, 1888, the state of the river was such for months that work was impossible. Preparations were made in good faith by the plaintiffs for carrying out all of the conditions of work under which the contract was renewed or extended, and large sums of money were spent by them for this purpose, to wit, the sum of $7,025.60. They made contracts for the supplies needed and built the additional incline and railways; also bought the additional cars and four additional steam drills, making the ten required. It was, however, impossible to use the second incline or railway tracks and other appliances on account of the state of the river, which would have swept everything away. Some time before work was possible, on account of the water, they had the inclines, railways, hoisting engines, extra cars, and additional drills required ready, but the height of
6 the river prevented the use of the additional incline, and the old incline was more than sufficient to carry all the rock which could possibly be gotten out in the flooded condition of the working space and conditions of work imposed by the said Stickney, as hereinafter more fully set forth.

Until after the middle of June the stage of the river was not only extremely uncertain, but the river bed about the work and between it and the incline by which the excavated material was conveyed away was covered from one-half foot to three feet deep with rushing water, and it was entirely impracticable for the plaintiffs to do their work and build other railway tracks from it to the inclines.

X. That in the summer of 1888, and shortly before the time when it became practicable by the subsiding of the river to begin operations upon the work, the said Major Amos Stickney, the engineer in charge, acting as agent of the United States, required and ordered that the plaintiffs should make a cut into the rock east (upstream) of the timber dam which they had built as aforesaid. This necessitated the removal of the central part of the timber dam. In order to protect the work thus left exposed from the water they were obliged to build an earthen dam, which extended crosswise of the river above the said cut and at its ends joined the timber dam. This earthen dam was begun June 17, and was sufficient to

keep out five feet of water. By June 30 the earthen dam had been so far completed and the river had so subsided that the plaintiffs were able to begin pumping water out of the working space. To do this they had a large steam pump at work, and by July 9 they were able to get their railway tracks to partially conform to the change of plan of the work and to commence drilling. In blasting, breaking up, and carrying off
7 the rock they were at this time working 192 men, and machinery (drills) equivalent to 175 men—a total of 367 men. In this estimate a steam drill equals 25 men. They also had other drills, representing 75 men, and cars and new inclines and steam hoisters ready for use, but could not use them because of the submerged condition of the work and want of room. Said working force, men, drills, cars, &c., was as large as could be efficiently used upon said work, and was sufficient to excavate 640 yards of rock per day, and move 640 cars, allowing a yard of rock to a car.

The plaintiffs aver and charge that the direction and order by the United States engineer to remove their timber dam and build the said dirt dam and make the said cut were unwise, unskillful, and improper, and resulted in great delay and damage to the plaintiffs, the said damage amounting to $2,000.

XI. That prior to this, plaintiffs had several times requested the said Major Amos Stickney, the United States engineer, to have large and increasing leaks in the Government dam repaired, which leaks let a large quantity of water into plaintiffs' works and greatly damaged them, but he refused to make any repairs on the said Government dam.

The plaintiffs aver and charge that it was the duty of the said engineer to keep the said dam in repair, and that his refusal was wrongful and unjust, and that the plaintiffs were greatly damaged and delayed by the leakage from the said Government dam, the loss and expense arising from which formed no proper part of the expense of the work which plaintiffs contracted to perform, and that such damage to plaintiffs amounted to $4,925, and arose from a cause within the control of the United States.

XII. That on July 11, 1888, the river rose to six feet eight
8 inches, broke over the plaintiffs' dam, and flooded their works. It kept rising daily—to seven feet ten inches, nine feet six inches, ten feet nine inches, eleven feet two inches, eleven feet four inches, and still rising.

From that time until July 30th the water never got below six feet. On that day it was five feet ten inches, and they began rebuilding the dam where it was broken, with fifty-three men and eight double teams. Three days later, August 2d, the water having subsided to five feet one inch, they began pumping the water out of their works.

XIII. That meantime they were also engaged in two other kinds of work, under the said United States engineer's directions. Upon the part of the rock that was exposed they set a number of their drills to work drilling holes (about 500 in all, representing the labor of 25 men for 25 days), so that they might be ready for rapid blasting as soon as the water subsided further.

They had also been directed and ordered by the said Major Amos Stickney, the United States engineer, to raise the Government dam so

that they would keep out eight feet of water. They followed such direction of the said engineer, and busily engaged in this work, and raised the dam and water gate over a foot by adding heavy timbers.

The plaintiffs aver and charge that this work of adding to the Government dam and gate was a matter of direct benefit and advantage to the United States, but was not included directly or indirectly in the plaintiffs' contract, and the expense thereof formed no proper part of the cost which the plaintiffs incurred, or were to incur, for the work which they contracted to perform, and the expense and loss to the plaintiffs, by reason of so adding to the Government dam and canal gate, by direction of the United States engineer, amounted to the sum of $788.

9 XIV. That on the 22d day of August, 1888, another sudden and violent freshet in the river swept away the entire Government dam at one place, and overflowed the plaintiffs' earthen dam and their works. The river stood five feet three inches on the 21st; on the 22d it was seven feet ten; on the 23d, eight feet eleven; the 24th, nine feet two; the 25th, ten feet; the 26th, eleven feet two, and still rising. During the time prior to this freshet there were 13 days during which the contractors could work in blasting, and at the time of the overflow they were working 192 men and seven steam drills, representing 175, or a total of 367 men, who were crowded in the working space, and a greater force could not be worked by the contractors effectually. Besides, other machinery, representing many men, was being operated in carrying off the blasted rock, as the contract required.

XV. That after each freshet it took time to get the maximum force to work. The water and swift current, if it did not destroy, disarranged the railway tracks. These had to be repaired and changed to suit the new plan of working imposed by the said Stickney as aforesaid; and it required some eight or nine days to pump out the water, and the damage was much increased by the large leaks aforesaid from the Government canal wall and dam.

XVI. That after the freshet of August 22d the river remained exceptionally high until October 5th, when it stood 4 feet 6 inches, and the plaintiffs again began rebuilding their dam, and on the 7th began again to pump out the water from their works. This was nearly completed, when on or about the 15th day of October, 1888, the dam and all the works were again overflowed by a freshet, the water rising rapidly to over 11 feet and submerging their three boilers, cars, etc., the violence of the freshet being such that one of the boilers was overturned.

10 From that time it was impossible to do anything upon the work. The exceptional height of the river, as well as the sudden rise, was such that it was impossible for plaintiffs to complete the work by the 31st day of December, 1888.

XVII. That completion of their work by plaintiffs within the time limited by the extended or renewed contract was unavoidably delayed and was a physical impossibility, and such impossibility was directly due to the freshets and force and violence of the elements and damage resulting therefrom, and to no want of faithfulness, or diligence, or skill, or from any voluntary departure from the specifications or requirements of the contract on the part of the plaintiffs, and the plaintiffs were entitled to a reasonable extension of time for completing the contract.

XVIII. That in blasting and handling their rock up to the year 1888 the plaintiffs did not use the highest grade of dynamite, and employed a large number of derricks for lifting large pieces of rock loosened by the blasts. In the last year of the contract the said Major Amos Stickney, the engineer, acting as the agent of the United States, directed and ordered them to discontinue the use of their derricks and to use a very high grade of dynamite, with the expectation that it would break the rock into pieces small enough to be handled without derricks. The result of this was that the high grade or strong dynamite did not break the rocks in the manner expected; and, as the derricks had been taken away, the plaintiffs were compelled to redrill and split the large loosened rocks in order that their men might handle them. Furthermore, the strong dynamite blew fragments of the rock to great distances and over the canal and upon several houses in the city of Louisville, including the glass-covered depot of the Chesapeake, Ohio and
11 Southwestern Railway Co. and the factory of the Kentucky Lead and Oil Co., amongst others. This led to local difficulties, extending from July to October, with the owners of these buildings, which considerably hampered the plaintiffs' work and resulted finally in an injunction order, issued by the Louisville chancery court on October 11, 1888, and executed on the plaintiffs on October 11 and October 16, 1888, forbidding the plaintiffs to do any more blasting at all. This injunction continued in force during the year 1888 and to the end of the time limited by the renewed contract.

And the plaintiffs aver and charge that such order and direction of the United States engineer to use said stronger grade of dynamite was unwise, unskillful, improper, and wrong, and resulted in much delay and in great expense and damage to the plaintiffs, amounting to the sum of $6,405, which sum forms no part of the proper or legitimate expense incurred, or to be incurred, by the plaintiffs in the performance of the work for which they contracted.

XIX. That as the work progressed there was found on it in a low part of the surface 1,000 yards, more or less, of gravel, sand, and earth, which was not known to either of the parties when the contract was made. The United States engineer refused to pay 85 cents per yard for the excavation of this material, but agreed that it should be included in his estimate of excavation at a total valuation of $500, and said gravel, sand, and earth was excavated by the plaintiffs, but was not included in the said engineer's estimate as promised, and the said $500 is still due to the plaintiffs from the United States.

XX. That Oscar Shanks, the assistant to the said Major Amos
12 Stickney, in one or more instances gave directions to the plaintiffs to excavate to a certain bottom grade, which plaintiffs did and finished as directed, and thereafter changed his mind and altered his directions and ordered plaintiffs to excavate to a lower grade, which altered directions plaintiffs obeyed, and thereby plaintiffs were put to great delay and expense in unnecessarily changing their railroad tracks and being compelled to employ carts in place of cars, such unnecessary changes costing the plaintiffs the labor of 6 men for 16 days at $1.25 per day, amounting to $120, besides unnecessarily delaying the plaintiffs in the completion of the contract, and the said $120 is due to the plaintiffs from the United States.

XXI. That since the last measurement and estimate by the United States engineer, in the latter part of the year 1887, the plaintiffs have performed a large amount of labor and excavation and have expended large sums of money, their running expenses since that date amounting to over the sum of $9,600, including an average monthly pay roll of $615, all of which labor and money was expended on the work to be performed under the contract.

That in the latter part of the year 1887 the plaintiffs excavated, in lowering the grade as last above stated, 1,000 yards of solid rock, for which they were entitled to 85 cents per yard under the contract, amounting to $850, but that no estimate of said 1,000 yards of excavation was ever made by the said Major Amos Stickney or his assistant, and the United States is now indebted to the plaintiffs for the said excavation in the sum of $850.

XXII. That in December, 1887, the plaintiffs excavated from the face of the work, in addition to that taken from the bottom as above stated, 1,000 yards of solid rock, for which they were entitled to
13 contract price of 85 cents per yard, amounting in all to $850, but for which they received no estimate, measurement, or payment, as required by the contract, and for this excavation the United States is now indebted to the plaintiffs in the sum of $850.

And the plaintiffs aver and charge that the United States engineer erred in making his measurements and estimates of the excavation performed by the plaintiffs under the contract, and that the plaintiffs performed a greater amount of excavation than was shown by the estimates of the said United States engineer prior to the 13th day of December, 1887. And the failure of the United States engineer to furnish correct estimates of the excavation performed, and his failure to make estimates and payments for the excavation performed by the plaintiffs in December, 1887, and in the year 1888, were breaches of the contract and caused great damage to the plaintiffs.

XXIII. That of the high grade or strong dynamite which the plaintiffs purchased for use, as ordered by the said Major Amos Stickney, the United States engineer, and which proved unsuitable and dangerous as aforesaid, the plaintiffs had left on hand 5,400 pounds which was of no use to them, and which they were obliged to dispose of promptly on account of its deterioration if kept on hand, and this dynamite the plaintiffs were obliged to sell at a loss; whereby the plaintiffs were damaged in the sum of $540. And the plaintiffs aver and charge that this damage resulted from the unskillfulness, misdirection, error, and fault of the said Major Amos Stickney, and from a cause within the control of the United States and not by any fault of the plaintiffs.

XXIV. That during the year 1888 the plaintiffs excavated 2,530 yards of solid rock, for which they received no measurement, or
14 estimate, or payment from the United States agent, and for which they were and are entitled to receive 85 cents per yard, the contract price, amounting to the sum of $2,150.50.

XXV. That on or about December, 1888, the said Major Amos Stickney refused to plaintiffs the extension of time which they requested, and to which they were rightfully entitled under the contract, by reason of being prevented from completing the same within the time limited by the last extension and renewal thereof, by freshets and by the force and

violence of the elements and by no fault of their own, and by reason of damages and hindrances from causes within the control of the United States; and the plaintiffs were thereby prevented from completing the work.

And the plaintiffs aver and charge that the said refusal of the said Stickney to extend the time for the completion of the contract was wrongful and unjust, and a breach of the contract.

XXVI. That when the plaintiffs were compelled to cease excavation in October, 1888, there was of solid rock blasted out, but not yet removed, a large quantity, which excavation, in that partly completed condition, was of a value of $550, which last-mentioned sum is due to the plaintiffs from the United States.

XXVII. That during the latter part of the year 1888 the plaintiffs drilled in the rock to be excavated under the contract a large number of holes of a value of $800, which holes were finished and ready for blasting, but which the plaintiffs were prevented from using by the refusal of the said Major Amos Stickney, the United States engineer, to grant the extension of time to which the plaintiffs were entitled as aforesaid, whereby the plaintiffs were damaged in the sum of $800.

15 XXVIII. That when the plaintiffs were thus compelled to cease operations they had completed upon the work the excavation of 39,965 cubic yards of rock, leaving in work or yet to be excavated 70,035 cubic yards. The latter would have produced 105,052 cubic yards of broken rock of a market value of 70 cents per cubic yard and a total value of $73,536.40, and would have been the property of the plaintiffs under the contract.

The contract price for the 70,035 yards of the remaining work, at 85 cents per yard, to be received by the plaintiffs from the United States, was $59,529.75. The cost to the plaintiffs of making this excavation would have been 70 cents per yard, a total cost of $49,024.50.

By the breach or breaches aforesaid of the contract the plaintiffs were deprived of large profits, to wit, of $10,505.25, the excess of the contract price over the cost of working, and of $73,536.40, the value of the excavated stone, a total profit of $84,041.65, and are damaged in the latter sum, which the plaintiffs are entitled to have and recover from the United States.

XXIX. That when the plaintiffs ceased work, as aforesaid, there was earned by them and due them from the United States the sum of $3,011.39, the same being a part of the contract price for work performed by the plaintiffs under the contract and estimated and accepted by the United States engineer or agent, and retained from plaintiffs, and the plaintiffs aver that said sum has been since the 31st day of December, 1888, and is now, rightfully due to and wrongfully withheld from them by the defendant.

XXX. That since the 13th of December, 1887, the plaintiffs have received no estimate or payment from the United States, or from any agent or officer of the United States, on account of this contract,

16 or for any work thereunder, notwithstanding the large amount of excavation performed by the plaintiffs in December, 1887, and in 1888.

And the plaintiffs aver and charge that such failures on the part of the said Major Amos Stickney to make the proper monthly estimates and

payments were breaches of the contract and of great damage to the plaintiffs.

XXXI. Wherefore the plaintiffs claim that they are justly entitled to have and to receive from the defendant the following sums of money:

For delay, loss, expense, and damage by reason of the removal of a portion of the timber dam and the building of the earthen dam at the direction and order of the United States engineer	$2,000.00
For delay, loss, expense, and damage by reason of the leakage from the United States Government dam into the works of the plaintiffs	4,925.00
For delay, loss, expense, and damage by reason of adding to the Government dam and canal wall by the direction and order of the United States engineer	788.00
For delay, loss, expense, and damage by reason of use of improper kind of dynamite ordered by the United States engineer to be employed	6,405.00
For excavating earth and loose rock on the work directed by Government officers to be excavated, at a less rate than 85 cents	500.00
For unnecessary changing of railroad tracks, and employment of carts instead of cars	120.00
For excavation performed on bottom of quarry during December, 1887	850.00
For excavation performed during December, 1887, on face of quarry	850.00
Damage by reason of loss on sale of dynamite ordered to be used by the United States engineer and found to be improper and useless for the purpose	540.00
17 For excavation performed during August, 1888	2,150.50
For loose rock blasted out but not removed in August, 1888	550.00
For drilling holes not used in July and August, 1888	800.00
Retained percentage on work performed and allowed	3,011.99
Profits which the plaintiffs would have made on 70,035 yards of solid rock still in work, including value of rock	84,041.65
Total	$107,532.14

XXXII. And the petitioners further represent that they, the plaintiffs, are the sole owners of the claim herein set forth and the only persons interested therein; that there has been no assignment or transfer thereof, or of any part thereof or interest therein, made; and that the plaintiffs are citizens of the United States and have always borne true allegiance thereto, and believe that the facts stated in this petition are true.

All of the above sums of money, amounting to one hundred and seven thousand five hundred and thirty-two dollars and fourteen cents ($107,532.14) the plaintiffs believe and claim to be justly due, and that they are entitled to have and recover the same from the defendant after allowing all just credits and set-offs.

Wherefore the plaintiffs pray judgment against the defendant for one hundred and seven thousand five hundred and thirty-two dollars and fourteen cents ($107,532.14).

H. N. Low,
Attorney for Plaintiffs.
Simrall & Bodley,
Of Counsel.

Petitioners' address is Louisville, Kentucky, and the address of their attorney is Room 164 Washington Loan and Trust Company, Ninth and F streets, Washington, D. C.

18 J. R. Gleason and George W. Gosnell say they are petitioners in the foregoing petition, and that the statements therein are true, as they believe.

J. R. Gleason.
George W. Gosnell.

STATE OF KENTUCKY, *County of Jefferson, ss:*

Before me, a notary public in and for the county and State above written, on this sixth day of June, 1892, personally appeared John R. Gleason and George W. Gosnell, the above-named petitioners, who, being duly sworn according to law, did depose and say that the facts set forth in the above petition are just and true as stated.

Witness my hand and seal as notary public aforesaid.

[SEAL.] TEMPLE BODLEY,
Notary Public.

EXHIBIT A.—Temple Bodley, notary public.

(Form 19 a.)

Articles of agreement entered into this fourth day of August, eighteen hundred and eighty-five (1885), between Lieutenant-Colonel William E. Merrill, Corps of Engineers, U. S. Army, of the first part, and J. R. Gleason and G. W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, of Louisville, of the county of Jefferson, State of Kentucky, of the second part:

This agreement witnesseth that, in conformity with the advertisement and specifications hereunto attached, and which form a part of this contract, the said Lieut. Col. Wm. E. Merrill, for and in behalf of the United States of America, and the said Gleason & Gosnell, for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

19 That the said Gleason & Gosnell shall make one hundred and ten thousand (110,000) cubic yards, more or less, of rock excavation in the enlargement of the Louisville and Portland Canal. That the said Lieut.-Col. Wm. E. Merrill shall pay for said rock excavation at the rate of eighty-five cents ($0.85) per cubic yard.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

The said Gleason & Gosnell shall commence work under this contract on or before the twentieth day of August, eighteen hundred and eighty-five (1885), and shall complete the same on or before the thirty-first day of December, eighteen hundred and eighty-six (1886).

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the sanction of the chief of engineers, to annul this contract by giving notice in writing to that effect to the party or parties (or either of them) of the second part, and upon the giving of such notice all money or reserved percentage due or to become

due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States (provided, however, that if the party or parties) of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successors, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the chief of engineers.

The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

Payments shall be made to the said Gleason & Gosnell when the work contracted for shall have been delivered and accepted, reserving 10 per cent from each payment until the whole work shall have been so delivered and accepted.

SPECIFICATIONS.

GENERAL DESCRIPTION.

1. It is proposed with the funds available ($120,000) to excavate to canal grade a portion of the area included between the guiding dyke, the present cross dam, and the cross dam as it will be when the proposed improvements are completed.

DISPOSITION OF EXCAVATED MATERIAL.

2. All material excavated under this contract will be the property of the contractor, and must be disposed of in such a manner as not to interfere with navigation, of which the engineer in charge shall be the judge. The contractor is forbidden to deposit any excavated material on canal property without permission.

3. All trees, snags, logs, and other loose articles on the space to be excavated must be removed without extra charge.

22 4. After any portion of the excavation is brought down to grade and accepted by the inspector the contractor will not be required to remove any deposits that may subsequently be carried into this area by currents or floods.

METHOD OF WORKING.

5. The excavation must be carried down to the established grade as shown on the maps on file in the canal office, which maps are hereby made a part of these specifications.

6. In blasting rock, the contractor will be expected to carry the excavation down to grade before moving his men elsewhere. The force working on the top ledge must not be more than 50 feet in advance of that which is employed in bottoming.

GENERAL REQUIREMENTS.

7. The contractor must begin work within 20 days after notification that his bid has been accepted, unless hindered by high water; and, within thirty days thereafter, his working force must consist of at least 200 men, if working by hand, or the equivalent thereof in case excavating machines are used. If, at any time, the working force be reduced to 150 men or less, the engineer in charge shall have the right to terminate the contract; and in such case the retained percentage shall be forfeited to the United States.

8. The contract will expire on the 31st day of December, 1886; but the right is reserved to annul the contract in January, 1886, in case forty per cent of the work covered by the same shall not have been completed on or before the 31st day of December, 1885. The annulment of the contract under the provisions of this paragraph will, however, involve no forfeiture of moneys previously earned.

9. The general form of contracts made under authority of the

23 War Department provides that additional time may be allowed to a contractor for beginning, or completing, his work in cases of delay from "freshets, ice, or other force or violence of the elements, and by no fault of his or their own."

10. The United States will not be responsible for any damages caused by floods, ice, or other causes not under their control.

CHANGES IN CONTRACT AND EXTRA WORK.

11. The following paragraphs form a part of all War Department contracts, and the attention of contractors and inspectors is specially called to them:

If at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

MEASUREMENT AND INSPECTION.

12. An inspector will be appointed, who will give all lines and levels, make all measurements, and will have general oversight of the work.

13. All measurements will be of material in place, and payment will be made accordingly. No payment will be made for excavation below the grades shown on the maps, which form part of these specifications.

14. It must be distinctly understood that it is not the duty of the inspector to act as engineer for the contractor, nor is he expected to boss the contractor's employés. When requested to do so he may give advice, but the contractor will be under no obligation to follow this advice, and the United States will not be responsible for any loss or damage that may result from following it. The duty of the inspector is limited to seeing that the work is performed in the manner prescribed by the specifications; and he will not interfere with the contractor unless the latter departs from the specifications, or adopts a method of working which, in the judgment of the inspector, will fail to secure the desired result, or will unnecessarily increase the total cost of the work.

PAYMENTS.

15. Payments will be made on monthly estimates, but ten per cent of the amount due will be retained until the completion of the contract.

INSTRUCTIONS TO BIDDERS.

1. All proposals must be on the accompanying form and must be in duplicate. Each proposal must also be accompanied by a guarantee signed by two responsible persons, each of whom shall justify in
25 the sum of ten thousand dollars ($10,000), that the bidder will, within ten days after being notified of the acceptance of his bid, enter into a contract in accordance with the terms and conditions of the advertisement, and will give bond, with good and sufficient sureties, for the faithful and proper fulfillment of the same.

2. When a firm is bidder the member of the firm who signs the firm name of the proposal should state in addition the names of all the individuals composing the firm.

3. All prices must be written in words as well as in figures.

4. All signatures must have affixed to them seals of wax or wafer.

5. The contract which the bidders and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the Engineer Department of the Army, blank forms of which will be furnished to parties proposing to put in bids. Bidders are to be understood as accepting the terms and conditions contained in such form of contract.

6. Reasonable grounds for supposing that any bidder is interested in more than one bid will cause the rejection of all the bids in which he is interested.

7. The United States reserves the right to reject any or all bids; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department.

8. The bidder must satisfy the United States of his ability to do the work for which he bids.

9. Transfers of contracts or of interests in contracts are prohibited by law.

10. The duplicate proposals should be placed in an envelope, which should be sealed and indorsed "Proposals for Rock Excavation at the Falls of the Ohio River;" and no responsibility shall attach for a premature opening of any proposal not so indorsed. If sent by mail,
26 the sealed proposals should be placed inside a second envelope, directed to Lieut. Col. Wm. E. Merrill, Corps of Engineers, Custom-House, Cincinnati, O.

11. A copy of this advertisement and specifications will be attached to the contract and will form a part thereof.

12. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid, or to whom information in respect to proposals may have been given.

13. Proposals must be prepared without assistance from any person belonging to or employed in the military service of the United States.

14. In accordance with law, all Government contracts must contain an express condition that no Member of Congress or Delegate shall be admitted to any share or part of such contract, or the benefit arising therefrom.

15. Bidders are invited to be present at the opening of the bids.

16. No bid will be entertained which is not made on the printed forms, and bidders are cautioned to see that the forms are properly filled out and signed in duplicate.

Neither this contract nor any interest therein shall be transferred by the said Gleason & Gosnell to any other party; and any such transfer shall cause the annulment of the contract, so far as the United States are concerned. All rights of action, however, to recover for any breach of this contract by the said Gleason & Gosnell are reserved to the United States.

No Member of or Delegate to Congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any part or share of this contract, or to any benefit which may arise therefrom.

This contract shall be subject to approval of the Chief of Engineers, U. S. A.

27 In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

WM. E. MERRILL, [SEAL.]
Lt. Col. Engr.
J. R. GLEASON. [SEAL.]
G. W. GOSNELL. [SEAL.]

Witnesses as to signatures of Gleason & Gosnell:

SAM'L B. CRAIL.
HENRY F. CASSIN.

As to Lt. Col. Wm. E. Merrill:

HENRY L. SMITH.

(Executed in quintuplicate.)
Approved August 14th, 1885.

JOHN NEWTON,
Chief of Engineers, Brig. and Bvt. Maj. Gen.

EXHIBIT B.—Temple Bodley, notary public.

(Form 19a.)

Supplemental articles of agreement entered into this 21st day of January, eighteen hundred and eighty-seven (1887), between Maj. Amos Stickney, Corps of Engineers, U. S. Army, of the first part, and John R. Gleason and George W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, of Louisville, of the county of Jefferson, State of Kentucky, of the second part.

This agreement witnesseth that the said Maj. Amos Stickney, for and in behalf of the United States of America, and the said Gleason & Gosnell, for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other as follows:

28 That the time for completing the contract signed by the said Gleason & Gosnell, August 4th (fourth), eighteen hundred and eighty-five (1885), for rock excavation in the enlargement of the Louisville and Portland Canal, be extended to December thirty-first (31st), eighteen hundred and eighty-seven (1887), upon the following conditions, viz: First, That the said Gleason & Gosnell shall so arrange their excavation on the line common to sections 2 (two) and 3 (three) as not to interfere with

the Government work of Contractor Mulloy, or the work of the contractor for the new wall of the said Louisville and Portland Canal. Second, That should the said Gleason & Gosnell fail to employ a sufficient force, not less than three hundred (300) men, or its equivalent in machinery, to finish their work in the required time, the officer in charge shall be authorized to perform any of the work in his discretion, and deduct the cost from any money due or to become due the said Gleason & Gosnell.

This supplemental contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

AMOS STICKNEY, [SEAL.]
Maj. of Eng'rs, U. S. A.
JOHN R. GLEASON. [SEAL.]
GEORGE W. GOSNELL. [SEAL.]
GLEASON & GOSNELL. [SEAL.]

Witnesses:

B. H. COOPER.
J. B. QUIN.
F. E. MACKENZIE.
F. E. McKENZIE.

(Executed in quintuplicate.)

29 EXHIBIT C.—Temple Bodley, notary public.

LOUISVILLE, KY., *December 31st, 1887.*

MAJOR AMOS STICKNEY,
Corps of Engineers, U. S. A.

DEAR SIR: We respectfully ask an extension of time on our contract for enlarging the Louisville and Portland Canal at the head of the falls of the Ohio River until the 31st of December, 1888, for the following reasons, to wit:

There was so much work being done upon railroads during the last year throughout the State that labor was very hard to get.

We used every effort to secure the required amount of labor on our contracts, but found it impossible to do so.

We even employed agents in New York and other cities to procure and ship labor to us here and then found it very difficult to hold the labor we obtained, although we paid more than contractors paid for labor on railroads. Besides, the summer season was excessively hot, so very hot that for sixty to ninety days in many instances the men would work only two or three hours a day.

We propose to provide not less than ninety cars of the same capacity as those now used and a sufficient number of carts and teams in addition, if necessary, to move not less than 640 cubic yards (measured in place) of excavated rock per day of ten hours.

We propose to build an additional incline for depositing excavated material, the minimum actual working capacity of both inclines to be not less than 640 cars per day of ten hours.

We propose to provide, maintain, and operate not less than ten steam drills on the work, and to provide and operate a sufficient force of men to excavate and handle at least 640 cubic yards of rock (measured in place) per day of ten hours.

The method of carrying on the work will be such as will be approved by the officer in charge.

30 When practicable during the summer season we propose to provide and operate an adequate force at night.

All additional plants will be obtained and available for use by the time rock excavation can be commenced, and we propose to bear all extra cost to the United States occasioned by the extension of time for completing our contract.

Very respectfully,
(Signed) GLEASON & GOSNELL.

EXHIBIT D.—Temple Bodley, notary public.

U. S. ENGINEER OFFICE,
NO. 507 WEST CHESTNUT STREET,
Louisville, Ky., Jan. 9th, 1888.

Messrs. GLEASON and GOSNELL,
Louisville, Ky.

SIRS: You are hereby notified that the time for completion of your contract for excavation in enlargement of the head of the Louisville and Portland Canal is extended to December 31st, 1888, on condition that the provisions in your letter of December 31st, 1887, a copy of which is enclosed, shall be faithfully carried out. Any failure to carry out these provisions will terminate your contract.

Very respectfully,
(Signed) AMOS STICKNEY,
Major of Engineers, U. S. A.

(1 enclosure.)

31 JOHN R. GLEASON AND GEORGE W. Gosnell, plaintiffs, *vs.* THE UNITED STATES, DEFENDANTS. } No. 17783.

II—*Petition—Filed October 25, 1892.*

To the honorable the chief justice and the judges of the Court of Claims:

The petition of John R. Gleason and George W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, residents of Louisville, in the State of Kentucky, and citizens of the United States, respectfully represents:

I. That a contract, under seal, was made by plaintiffs, as parties of the second part, with Maj. Amos Stickney, Corps of Engineers, U. S. Army, acting for and in behalf of the United States, as party of the first part, and signed and delivered by the parties thereto January 13, 1887, and approved by the Chief of Engineers of the United States Army,

copy of which is hereto attached, marked "Exhibit 1," and prayed to be taken as a part of this petition.

II. That by this contract the plaintiffs contracted with the United
32 States to perform certain public work for the defendant, namely, one hundred and twenty-four thousand (124,000) cubic yards of earth excavation and thirteen thousand (13,000) cubic yards of solid-rock excavation, to be performed by the plaintiffs in the enlargement of the basin of the Louisville and Portland Canal at the head of the locks. For this work the plaintiffs were to receive seventeen and one-half cents ($17\frac{1}{2}$) per cubic yard for earth excavation and for solid-rock excavation one dollar and five cents ($1.05) per cubic yard.

III. That the time for completing the work under this contract was extended to December 1, 1888, by the said Maj. Amos Stickney, by letters dated January 7, 1888, and September 7, 1888, copies of which letters are hereto attached, marked respectively "Exhibit 2" and "Exhibit 3," and are prayed to be taken as a part of this petition.

IV. That the said contract contains the following provision:

"If the party (or parties) of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented from either commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

The advertisements and specifications of the United States inviting bids for the contract, and which, by the terms of the contract, are a part thereof, also contained a promise to the same effect, namely:

33 "9. The general form of contracts made under authority of the War Department provides that additional time may be allowed to a contractor for beginning or completing his work in case of delay from 'freshets, ice, or other force or violence of the elements and by no fault of his or their own.'"

V. That the work consisted of the excavation of over 124,000 cubic yards of earth and over 13,000 cubic yards of underlying solid rock, in a space lying parallel with the axis of the new locks, at the head of the latter on the north side of the canal wall.

The material was to be dumped principally in the space just north of the excavation. Prior to the commencement of the work the space to be excavated was covered with earth rising higher than the wall of the canal.

For the completion of this work certain extensions were granted, as aforesaid, on account of the flooded condition of the work and the consequent difficulties encountered by the plaintiffs in performing it. The last extension was from September 7 until December 1, 1888.

That by this allowance of additional time and extension of the contract the rights and obligations of the parties thereto subsisted, took effect, and were enforcible precisely as if the new date for the completion of the contract had been the date originally therein agreed upon.

VI. That during the last extension and renewal of the contract, namely, between the seventh day of September and the first day of December, 1888, the plaintiffs were, by freshets and the force and violence of the elements, and by no fault of their own, prevented from completing the work at the time agreed upon in the contract. Between said dates unusual and violent freshets in the Ohio River flooded and damaged
34 their works and unavoidably delayed the work of excavation, and prevented its completion within the time limited, namely, on or before the 1st day of December, 1888.

And the plaintiffs aver that for this cause they were entitled to the allowance of additional time for the completion of said work, as provided in said specifications and contract.

VII. That the specifications forming part of the contract further contained the following provisions:

"3. The work will consist of the excavation and removal of all material to canal grade, and finishing and sloping the berms, banks, etc., as shall be directed by the engineer in charge.

"4. The present retaining wall and a narrow embankment of earth behind it, properly sloped to prevent caving and washing, will be left standing."

VIII. That the specifications on which the plaintiffs bid particularly located the work to be done and the excavation to be made with reference to the United States canal wall, and provided for a sufficient retaining embankment along said wall.

And the plaintiffs aver that they were enabled to undertake the work because of and they relied upon the said canal wall and a sufficient embankment along the same.

And they further aver and charge that under said contract the United States undertook the maintenance of the said canal wall and the leaving of a sufficient embankment therefor, and that they, the plaintiffs, were bound to obey the directions and orders of the United States engineer in charge in all things relating to the leaving, constructing, and finishing said wall and embankment.

IX. That plaintiffs, as they were bound to do, made the exca-
35 vation up to the line and place directed by the said Major Amos Stickney, United States engineer in charge, through his assistant, leaving the said retaining wall, with such embankment of earth of such width and so sloped, as the said engineer directed.

X. That the embankment which was thus left by the said engineer was not of sufficient width or strength to prevent caving and washing. The water from the canal broke through the said wall, washed the embankment away, and flooded the plaintiffs' works, and this happened without any fault of the plaintiffs, but by reason of the character of the Government wall and the fault of the said United States engineer in directing it to be so nearly uncovered that it could not retain the water.

The plaintiffs, notwithstanding, used every means in their power to repair the damage. They put a heavy steam pump to work to pump this water out; they pointed the canal wall with cement; they built a large embankment against it of bags of earth, putting in five hundred bags of this, besides loose earth; they used tarpaulins and barrels, sawdust in the canal, and straw manure on the other side of the canal wall.

As fast as they would stop it in one place it would break through in another. They, therefore, built a five-foot dam across their works, so as to exclude the western half, where the excavation had been carried down to below the rock level from the eastern half, where there was much earth to excavate. Their railway tracks being submerged and the working space difficult of access, they had to carry off this earth partly by carts, of which they had as many as practicable—about ten double teams.

And the plaintiffs aver and charge that the orders and directions of and by the said United States engineer given to them, the plaintiffs, under and in pursuance of the above-quoted clauses 3 and 4 of
36 the specifications, forming a part of the contract, as aforesaid, in relation to the making of the excavation, the leaving of the embankment, and the finishing and sloping the berms, banks, etc., were unwise, unskillful, improper, and incompetent, and resulted in a great amount of pumping, banking, and labor which was not at all incidental to the work, but wholly unnecessary, and would not have been encountered, except for the errors and unskillfulness of the said United States engineer, and thereby caused great damage to the plaintiffs, amounting to the sum of $3,750, as well as great delay of the work, and that this delay and damage arose from no fault of the plaintiffs, and resulted from causes within the control of the United States.

XI. That a further cause of damage and delay to the plaintiffs was the lack of dumping facilities, and compulsory and unnecessary changes of their railroad tracks, resulting from the acts of the agent of the United States.

Dumping in the space north of the excavation having been stopped, the plaintiffs were required to dump about 10,000 cubic yards on the far side of the old locks. Upon the high embankment, or fill, made by them, they had in place, and part of the time in operation, three steam hoisters, with railway tracks extending from them down into the space to be excavated, on one side; and on the other, along the top of the high embankment, to the place for dumping. When this high embankment was filled up to the satisfaction of the engineer, the contractors were required to extend their tracks along a narrow way westwardly from the main embankment, and dumping could only be done on one side—that is, on the north side. The contractors being limited to this confined dumping space, were unable to carry on their earth excavation faster than they did.

37 There was no good or sufficient reason why the plaintiffs should not have been permitted to extend their tracks and dumping westwardly or northwestwardly, and there was in such direction a large space to be filled, and the United States engineer has, since the year 1888, extended the dump northwestwardly, but the plaintiffs were forbidden to so arrange their tracks or dispose of their excavated material.

The dumping space was so limited that it was impracticable to dump more earth than one steam hoister would bring from the excavation; and, in part, for that reason, only one of the three was used during most of the time.

There was continual, unnecessary, and improper changing of railway tracks, under the direction of said Major Amos Stickney, the United States engineer in charge of the work, through his assistant, which also materially hindered progress.

And the plaintiffs aver and charge that the orders and directions of the said United States engineer in charge of the work, in respect to dumping the material excavated, and in respect to frequently changing the location of the plaintiffs' railway tracks, were unwise, unskillful, unnecessary, and wrong, and resulted unavoidably in depriving the plaintiffs of proper and reasonable dumping facilities, and in great delay of the work and damage to the plaintiffs, the said damages amounting to the sum of $3,150.

XII. That in or about the month of October, 1888, the said Major Amos Stickney, through his assistant, ordered that a roadway made by plaintiffs, as they had been directed, should be changed, agreeing that the plaintiffs should be reimbursed for the labor thereby entailed upon them. That the plaintiffs made such change as ordered by the said Stickney at a cost of $150.00.

38 XIII. That on the latter portion of the excavation performed and completed by the plaintiffs in accordance with the contract they received from the United States engineer no estimate or payment; that the work so performed and for which the stipulated payment is still due from the United States to the plaintiffs consisted of 21,475 yards of earth, at seventeen and one-half cents (17½) per yard, and 500 yards of solid rock, at one dollar and five one-hundredths ($1.05) per yard, and the amount due for the same is $4,283.12.

And the plaintiffs aver and charge that the United States engineer erred in his estimates and measurements of the excavation performed by the plaintiffs. And the failure of the United States engineer to furnish correct estimates of the excavation performed, and his failure to make an estimate and payment for the excavation last performed by the plaintiffs as aforesaid, were breaches of the contract and caused great damage to the plaintiffs.

XIV. That on or about December, 1888, the said Major Amos Stickney refused to plaintiffs the extension of time which they requested, and to which they were rightfully entitled under the contract by reason of being prevented from completing the same within the time limited by the last extension and renewal thereof by freshets and by the force and violence of the elements, and by no fault of their own, and by reason of damages and hindrances from causes within the control of the United States, and the plaintiffs were by such refusal prevented from finishing the work.

And the plaintiffs aver and charge that the said refusal of the said Stickney to extend the time for the completion of the contract was wrongful and unjust and a breach of the contract, and that the contract was not annulled in the manner or for the reasons provided in the contract for an annulment thereof.

39 XV. That the plaintiffs at the time when they were prevented from completing the work as aforesaid had drilled in the solid rock to be excavated under the contract 130 holes for blasting of a value of $52, which holes they were prevented from utilizing, first, by reason of the leakage of water through the canal wall, and subsequently by reason of the refusal of the said Major Amos Stickney to allow the further time for the completion of the work to which the plaintiffs were entitled as aforesaid.

XVI. That the space included by the work and the contract therefor as ultimately fixed did, as a matter of fact, contain 132,000 cubic yards of earth and 17,000 cubic yards of solid rock. Of this amount the plaintiffs had at the time when they were obliged to cease work, as above stated, completed the excavation of 125,060 cubic yards of earth and 3,998½ cubic yards of rock, leaving still to be excavated 6,940 cubic yards of earth and 13,001½ cubic yards of rock.

The contract price for the remaining earth excavation at 17½ cents per yard would have been $1,214.50, and for the remaining solid rock excavation at $1.05 per yard would have been $13,651.58. The cost to the plaintiffs of making such excavations would have been $3,250.37 for the rock, and $1,214.50 for the earth.

And the plaintiffs aver that by the breach or breaches aforesaid of the contract on the part of the agent of the United States the plaintiffs were deprived of large profits, to wit, of $10,401.21, the excess of the contract price over the cost of working.

XVII. That when the plaintiffs were prevented from completing the work as aforesaid there was earned by them and due them from the United States the sum of $2,394.26, the same being a part of the contract price for work performed by the plaintiffs under the contract and
40 estimated and accepted by the United States engineer or agent, and retained from plaintiffs, and the plaintiffs aver that said sum has been, since the 1st day of December, 1888, and is now, rightfully due to and wrongfully withheld from them by the defendant.

XVIII. Wherefore the plaintiffs claim that they are entitled to have and to receive from the defendant the following sums of money:

For delay, loss, expense, and damage to earth excavation, from the flooding of said excavation through the United States canal wall by reason of fault and improper orders and directions of the United States engineer in charge in respect of leaving, sloping, and finishing the embankment by the United States canal wall	$3,750.00
For delay, loss, expense, and damage by reason of fault and improper orders and directions of the United States engineer in charge as to dumping the excavated material, and as to changes in the plaintiffs' railway tracks, whereby plaintiffs were hindered, put to unnecessary expense, and deprived of proper and reasonable dumping facilities and room	3,150.00
For loss, expense, and damage for teams and labor	150.00
For excavation done and completed in accordance with the contract, for which plaintiffs received no estimate from the United States engineer or compensation	4,283.12
For drilling holes which the plaintiffs were prevented from using	52.00
Retained percentage on work performed and allowed	2,394.26
Profits which the plaintiffs would have made on 13,001½ cubic yards of solid rock excavation remaining in work	10,401.21
Total	$24,180.59

41 XIX. And the petitioners further represent that they, the plaintiffs, are the sole owners of the claim herein set forth, and the only persons interested therein; that there has been no assignment or transfer thereof, or of any part thereof or interest therein, made; and that the plaintiffs are citizens of the United States, and have always borne true allegiance thereto, and believe that the facts stated in this petition are true.

All of the above sums of money, amounting to twenty-four thousand one hundred and eighty dollars and fifty-nine cents ($24,180.59), the

plaintiffs believe and claim to be justly due, and that they are entitled to have and recover the same from the defendant, after allowing all just credits and set-offs.

Wherefore the plaintiffs pray judgment against the defendant for twenty-four thousand one hundred and eighty dollars and fifty-nine cents ($24,180.59).

H. N. Low,
Attorney for Plaintiffs.
Simrall & Bodley,
Of Counsel.

Petitioners' address is Louisville, Kentucky, and the address of their attorney is Room 164, Washington Loan and Trust Company Building, Ninth and F streets, Washington, D. C.

J. R. Gleason and George W. Gosnell say they are petitioners in the foregoing petition, and that the statements therein are true as they believe.

J. R. Gleason,
Geo. W. Gosnell.

County of Jefferson, *State of Kentucky:*

Subscribed and sworn to before me this 6th day of June, 1892, by J. R. Gleason and George W. Gosnell.

Witness my hand and seal as notary public in and for the county and State aforesaid.

Temple Bodley,
Notary Public, Jefferson County, Kentucky.

42 State of Kentucky, *County of* , *ss:*

Before me, a notary public in and for the county and State above written, on this 6th day of June, 1892, personally appeared John R. Gleason and George W. Gosnell, the above-named petitioners, who, being duly sworn according to law, did depose and say that the facts set forth in the above petition are just and true as stated.

Witness my hand and seal as notary public aforesaid.

[seal.] Temple Bodley,
Notary Public.

Exhibit 1.—Temple Bodley, notary public.

(Form 19 a.)

Articles of agreement entered into this 13th day of January, eighteen hundred and eighty-seven (1887), between Maj. Amos Stickney, Corps of Engineers, U. S. Army, of the first part, and John R. Gleason and George W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, of Louisville, of the county of Jefferson, State of Kentucky, of the second part.

This agreement witnesseth, that in conformity with the advertisement and specifications hereunto attached, and which form a part of this contract, the said Amos Stickney, for and in behalf of the United States of America, and the said Gleason & Gosnell, for themselves, their heirs, exec-

utors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other as follows:

That the said Gleason & Gosnell shall perform the following work, viz: One hundred and twenty-four thousand (124,000) cubic yards, more or less, of earth excavation, and thirteen thousand (13,000) cubic yards, more or less, of solid rock excavation, for enlarging the basin of the Louisville and Portland Canal at the head of the locks.

43 That the said Maj. Amos Stickney shall pay the said Gleason & Gosnell for the said excavation as follows:

For earth excavation, seventeen and one-half cents (17½) per cubic yard *yard*.

For solid rock excavation, one dollar and five cents ($1.05) per cubic yard.

Measurements to be made in place.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

The said Gleason & Gosnell shall commence said excavation on or before the first (1st) day of February, eighteen hundred and eighty-seven (1887), and shall complete the whole work on or before the thirty-first (31st) day of December, eighteen hundred and eighty-seven (1887).

If in any event the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first

44 part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: Provided, however, that if the party (or parties) of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally agreed upon.

If at any time during the prosecution of the work it be found advan-

tageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reason for such change and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

45 No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

Payments shall be made to the said Gleason & Gosnell as provided for in said specifications, reserving ten (10) per cent from each payment until the whole work shall have been so delivered and accepted.

Neither this contract nor any interest therein shall be transferred by the said Gleason & Gosnell to any other party; and any such transfer shall cause the annulment of the contract so far as the United States are concerned. All rights of action, however, to recover from any breach of this contract by the said Gleason & Gosnell are reserved to the United States.

No Member of or Delegate to Congress, nor any person belonging to or employed in the military service of the United States is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

This contract shall be subject to approval of the Chief of Engineers, U. S. A.

46 In witness whereof the undersigned have hereunto placed their hands and seals the date first hereinbefore written.

AMOS STICKNEY, [SEAL.]
Maj. of Engineers.

JOHN R. GLEASON. [SEAL.]
GEORGE W. GOSNELL. [SEAL.]
GLEASON & GOSNELL. [SEAL.]

Witnesses:

B. H. COOPER.
ROBERT STEEL.
J. B. QUIN.
J. B. QUIN.

(Executed in quintuplicate.)

Louisville and Portland Canal.

SPECIFICATIONS FOR ENLARGING BASIN.

GENERAL DESCRIPTION.

1. It is proposed with the funds available, about $47,500 contingent expenses, to enlarge the basin at the head of the new locks on the north side of the present canal, as far as the available funds will permit.

2. The space to be excavated lies parallel with the axis of the new locks, and when completed will add 125 feet additional width to the present canal, from the locks to the present basin.

3. The work will consist of the excavation and removal of all material to canal grade, and finishing and sloping the berms, banks, etc., as shall be directed by the engineer in charge.

4. The present retaining wall and a narrow embankment of earth behind it, properly sloped to prevent caving and washing, will be left standing.

47 5. The buildings and fences at present standing on the site of the proposed work will he removed by and at the expense of the United States. The buildings are to be moved north of their present location as soon as the ground has been filled to the proper level by the contractor at their new sites. The filling under and around the proposed sites of these buildings will have to be made before they will be moved.

6. The present highway leading through the canal grounds is to be changed so as to pass between the present canal shops and the old locks. An embankment will have to be made for this highway, by the contractor, out of the material excavated, as specified in paragraph 16, and a temporary highway must be provided at some suitable place until the permanent site is prepared.

7. The contractor will be required to protect the property of the United States and will be held responsible for loss or damage to property caused by any of his agents or employees.

8. Where fences and enclosures exist, or should hereafter be made, they must be preserved, and should openings be required by the contractor they must be made at such places as directed by the engineer in charge, and suitable gates provided and kept closed by the contractor while not in actual use.

APPROXIMATE QUANTITIES.

9. Earth excavation, 124,000 cubic yards. Solid rock excavation, 13,000 cubic yards.

CLASSIFICATION.

10. Earth excavation will include clay, sand, gravel, loam, stones, and bowlders of all descriptions not exceeding one cubic yard in volume, all rock or slate that has heretofore been excavated, or any other material of an earthy nature not coming under the head of solid rock.

48 11. Solid rock excavation will include all rock that is regularly stratified and in position that can not be excavated except by blasting, or stones or bowlders that contain one cubic yard or more.

DISPOSITION OF MATERIAL.

12. All material excavated under this contract will be the property of the United States and must be used in filling canal grounds in the vicinity of the old and new locks, principally, however, the grounds between them, except as specified in paragraph 18.

13. All filling must be done evenly and regularly to such heights and with such slopes as shall be directed by the engineer in charge, who shall also designate the places and order of filling the same.

14. All trees, logs, hedges, or other material found on the ground to be excavated must be removed free of charge.

15. The filling around and under the proposed sites of the buildings that are to be moved, as mentioned in paragraph 5, must be carefully made in layers not to exceed one foot in thickness. The layers must be carefully spread, and all large lumps of earth broken up, and the whole well rammed and packed in place before the next layer is put on. This must be the first filling done.

16. An embankment or fill will be made from the excavated material for the proposed highway change, which shall be made before the other portions of the grounds are filled and immediately after the ground is prepared for the sites of the buildings, which must be of such heights and slopes as directed by the engineer in charge.

17. Some filling will also be required to and around the approaches to the bridge across the old locks.

18. In case the United States desires to reserve the rock excavated, or any part thereof, it must be piled in such manner and places as directed by the engineer in charge, or be used for filling, or dumped where needed for protection of banks, at such places as shall be directed by the engineer in charge.

49

METHOD OF WORKING.

19. The excavation must be carried down to the established canal grade, as shown on maps on file in canal office. The earth will be removed first.

20. In blasting rock the contractor will be expected to carry the excavation down to grade before moving his men elsewhere. The force working on the top ledge must not be more than 50 feet in advance of the bottoming at any time.

21. No excavation will be paid for below or outside the grades and lines given by the engineer in charge.

22. Whatever material may be deposited by high water upon the area to be excavated after the contract is made must be removed by the contractor free of cost to the United States.

23. It is to be understood that the contractor is to furnish all of the machinery and appliances necessary, and to perform all of the labor for the excavation and distribution of material. This includes whatever banking and pumping that may be necessary for excluding water and the protection of the work until completion. The Government is to furnish nothing, and be put to no expense whatever, except for the plans for an inspector and for the payment for excavation at the rates per yard agreed upon.

24. The contractor shall so conduct the work as not to interfere with navigation, in which he will be governed by the orders of the engineer in charge.

25. In case of any failure on the part of the contractor to perform the work with due diligence, the officer in charge shall be authorized to perform any of the work in his discretion and deduct the cost from any money due or to become due the contractor.

50 26. Bidders are expected to inspect the site of the work and to obtain all necessary information from this office before making proposals.

27. Bidders will state in their proposals the time when they will begin the work and the time when they will complete it; also the number of men they will employ.

28. Payments will be made on monthly estimates, reserving ten per cent from each payment until completion of contract.

LOUISVILLE, KY., *November 5th, 1886.*

GENERAL INSTRUCTIONS FOR BIDDERS.

1. All bills must be made in duplicate upon printed forms to be obtained at this office.

2. The guaranty attached to each bid must be signed by two responsible guarantors, to be certified to as good and sufficient guarantors by a United States district attorney, collector of customs, or any other officer under the United States Government, or responsible person known to this office.

3. When firms bid the individual names of the members should be written out, and should be signed in full, giving the Christian names; but the signers may, if they choose, describe themselves in addition as doing business under a given name and style as a firm.

4. All signatures must have affixed to them seals of wax or wafer.

5. The place of residence of every bidder, with county and State, must be given after his signature, which must be written in full.

6. All prices must be written as well as expressed in figures.

7. A percentage of ten (10) per centum will be retained from each payment until the completion of the contract, except where (as
51 in cases in which no payment is to be made until a work is completed) such percentage may, in the opinion of the officer in charge, properly be dispensed with.

8. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in each form of contract.

9. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

10. The United States reserves the right to reject any or all bids; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department.

11. The bidder must satisfy the United States of his ability to furnish the materials or perform the work for which he bids.

12. Transfers of contracts or of interests in contracts are prohibited by law.

13. In submitting proposals the sealed envelope must be so indorsed as to indicate before being opened the particular work for which the bid is made.

14. A guaranty will be required with the bid, and the guarantors must justify in the sum of ten thousand dollars.

15. Contract and bond must be filed within ten days after date of notification of award. The contractor's bond will be for ten thousand dollars.

52 EXHIBIT 2.—Temple Bodley, notary public.

U. S. ENGINEER OFFICE,
No. 507 WEST CHESTNUT ST.,
Louisville, Ky., January 7, 1888.

Messrs. GLEASON & GOSNELL,
Louisville, Ky.

SIRS: You are hereby notified that the time for completion of your contract for excavation in enlarging the basin of the Louisville and Portland Canal is extended to June 1, 1888, upon condition that you bear all extra expenses to the United States caused by the extension of time.

Very respectfully,
(Signed) AMOS STICKNEY,
Major of Engineers, U. S. A.

EXHIBIT 3.—Temple Bodley, notary public.

U. S. ENGINEER OFFICE,
No. 507 WEST CHESTNUT STREET,
Louisville, Ky., September 7, 1888.

Messrs. GLEASON & GOSNELL,
Louisville, Ky.

SIRS: The time for completing your contract, dated January 13, 1887, for enlarging basin of the Louisville and Portland Canal, at the head of the locks, is further extended to December 1, 1888, provided your work shall be so arranged as not to interfere with such other work as may be undertaken under the new appropriation, and that all extra cost to the United States by reason of the extension of time shall be charged against you and deducted from your payments.

Very respectfully,
(Signed) AMOS STICKNEY,
Major of Engineers, U. S. A.

53 III.—*Motion of claimants to consolidate and allowance of same.—Filed January 14, 1897.*

JOHN R. GLEASON AND GEORGE W. GOSNELL
vs.
THE UNITED STATES.
} Nos. 17782 and 17783.

Now come the claimants by their attorney, H. N. Low, and move the honorable court for the issuance of an order consolidating the above cases.

The grounds of the motion are that the parties are the same, the subjects-matter of the two cases are similar and related, that labor in briefing and arguing the cases when thus consolidated will be much lessened, and the cases can under such condition be more readily considered and disposed of by the court; a considerable part of the evidence relating to and having been filed in both cases.

JOHN R. GLEASON and
GEORGE W. GOSNELL,
By H. N. LOW, *Attorney.*

WASHINGTON, *January 11, 1897.*

I concur in the above.

GEORGE H. GORMAN,
Asst. Attorney for Defts.

Allowed.

C. C. NOTT,
Chief Justice.

54 IV.—*Traverse.—Filed May 25, 1897.*

In the Court of Claims of the United States, December Term, A. D. 1896.

JOHN R. GLEASON AND GEORGE W. GOSNELL
vs.
THE UNITED STATES.
} No. 17782 & 17783 (consolidated).

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

55 V.—*Findings of fact (as amended), and conclusions of law.—Filed December 6, 1897.*

These cases having been heard before the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

Upper work—Case No. 17782.

I.

On August 4, 1885, Lieut. Col. William E. Merrill, Corps of Engineers, United States Army, for and on behalf of the United States, party of the

first part, and John R. Gleason and George W. Gosnell, partners, of the second part, entered into the contract and specifications set out in full with and made a part of the petition herein, whereby the claimants agreed to commence work on or before August 20, 1885, and make "110,000 cubic yards, more or less, of rock excavation in the enlargement of the Louisville and Portland Canal," as therein provided for, at the rate of 85 cents per cubic yard, and to complete the same on or before December 31, 1886.

Said contract further, and among other things, provided that—

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties (or either of them) of the second part, and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States (provided, however, that if the party or parties) of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

56 II.

The season from August, 1885, to December 31, 1886, was favorable in the main for the character of work provided for by the contract, though the claimants were compelled by reason of high water and freshets to suspend their operations a number of times, and by reason of these difficulties, coupled with an insufficient force of men and other means necessary for the performance of the work, they only "completed 14 per cent of their entire work" during the contract period, 1½ per cent of which was done in 1885.

III.

In consequence of the claimants' inability to complete the work within the contract period, as aforesaid, they requested an extension of their

contract to December 31, 1887, which was granted on conditions stated in a supplemental contract, as follows:

ARTICLES OF AGREEMENT.

"Supplemental articles of agreement entered into this 21st day of January, eighteen hundred and eighty-seven (1887), between Major Amos Stickney, Corps of Engineers, U. S. Army, of the first part, and John R. Gleason and George W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, of Louisville, of the county of Jefferson, State of Kentucky, of the second part.

"This agreement witnesseth that the said Major Amos Stickney, for and in behalf of the United States of America, and the said Gleason & Gosnell, for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows:

"That the time for completing the contract signed by the said Gleason & Gosnell, August 4th (fourth), eighteen hundred and eighty-five (1885), for rock excavation in the enlargement of the Louisville and Portland Canal, be extended to December 31st (thirty-first), eighteen hundred and eighty-seven (1887), upon the following conditions, viz:

"First. That the said Gleason & Gosnell shall so arrange their excavation on the line common to sections 2 (two) and 3 (three) as not to interfere with the Government work of Contractor Molloy or the work of the contractor for the new wall of the said Louisville and Portland Canal.

"Second. That should the said Gleason & Gosnell fail to employ a sufficient force, not less than three hundred (300) men, or its equivalent in machinery, to finish their work in the required time, then the officer in charge shall be authorized to perform any of the work in his discretion, and deduct the cost from any money due or to become due the said Gleason & Gosnell."

The foregoing agreement was made subject to approval of the Chief of Engineers, United States Army, and was thereafter duly approved by the acting Secretary of War.

IV.

The claimants not having completed their contract during the year's extension thereof as aforesaid, they, on December 31, 1887, requested a second extension of said contract to December 31, 1888, for the reasons set forth in their communication of that date, which is as follows:

"LOUISVILLE, KY., *Dec. 31st, 1887.*

"Major AMOS STICKNEY,

"*Corps of Engineers, U. S. A.*

"DEAR SIR: We respectfully ask an extension of time on our contract for enlarging the Louisville and Portland Canal at the head of the Falls of the Ohio River until the 31st of December, 1888, for the following reasons, to wit:

"There was so much work being done upon railroads during the last year throughout the State that labor was very hard to get.

57 "We used every effort to secure the required amount of labor on our contracts, but found it impossible to do so. We even

employed agents in New York and other cities to procure and ship labor to us here, and then found it very difficult to hold the labor we obtained, although we paid more than contractors paid for labor on railroads. Besides, the summer season was excessively hot; so very hot, that for sixty to ninety days, in many instances, the men would work only two or three hours a day.

"We propose to provide not less than ninety cars of the same capacity as those now used, and a sufficient number of carts and teams in addition, if necessary, to move not less than 640 cubic yards (measured in place) of excavated rock per day of ten hours.

"We propose to build an additional incline for depositing excavated material, the minimum actual working capacity of both inclines to be not less than 640 cars per day of ten hours.

"We propose to provide, maintain, and operate not less than ten steam drills on the work and to provide and operate a sufficient force of men to excavate and handle at least 640 cubic yards of rock (measured in place) per day of ten hours.

"The method of carrying on the work will be such as will be approved by the officer in charge.

"When practicable, during the summer season, we propose to provide and operate an adequate force at night.

"All additional plant will be obtained and available for use by the time rock excavation can be commenced, and we propose to bear all extra cost to the United States occasioned by the extension of time for completing our contract.

"Very respectfully,

"GLEASON & GOSNELL."

Which letter was forwarded to the Chief of Engineers with the following communication:

"U. S. ENGINEER OFFICE,
"*Louisville, Ky., December 31st, 1887.*

"The CHIEF OF ENGINEERS, U. S. Army,
"*Washington, D. C.*

"GENERAL: I have the honor to forward herewith an application of Gleason & Gosnell for extension of time for completion of their contract on work of excavating for enlargement of the head of the Louisville and Portland Canal.

"The work of these contractors during the past season has been exceedingly unsatisfactory. Whilst they have had some difficulties to contend with in procuring labor, they have not conducted their work in a manner to produce the best results, and hardly seemed to comprehend the magnitude of their undertaking.

"After a number of consultations with the contractors and their principal bondsman, I have, however, concluded that the interests of the Government will be best served by an extension of time with the provisions which they have inserted in their application.

"These provisions call for nearly double the plant heretofore used and the adoption of method of work which will be approved by the engineer in charge; also the bearing of all extra expense to the United States occasioned by the extension of time. With these provisions, I believe

the engineer officer in charge will be able to push the work more rapidly than if it were relet to other contractors. I therefore recommend that the time for completing of their contract be extended as requested to December 31, 1888, on condition that the provisions in their application are faithfully carried out.

"Very respectfully, your ob'd't servant,

"AMOS STICKNEY,
"*Major of Engineers, U. S. A.*"

The extension of the time of said contract to December 31, 1888, as requested and recommended, was granted and approved by the Chief of Engineers "on condition that the provisions in their application are faithfully carried out," of which approval the claimants were notified by the following letter:

"U. S. ENGINEER OFFICE,
"*Louisville, Ky., January 9th, 1888.*

"Messrs. GLEASON & GOSNELL,
Louisville, Ky.

"SIRS: You are hereby notified that the time for completion of your contract for excavation in enlargement of the head of the Louis-
58 ville and Portland Canal is extended to December 31st, 1888, on condition that the provision in your letter of December 31, 1887, a copy of which is inclosed, shall be faithfully carried out. Any failure to carry out these provisions will terminate your contract.

Very respectfully,

"AMOS STICKNEY,
"*Major of Engineers, U. S. A.*"

V.

The rock to be excavated under the contract was in the river bed in an exposed situation, and was exposed to great force of the river when the latter rose to stages above the top of the Government cross dam, which cross dam was 5 feet high, measured by the canal gauge.

VI.

Before the contract aforesaid was entered into the engineer in charge prepared specifications for the information of bidders, which were exhibited to the claimants, and on the faith of which they entered into the contract. These specifications (7) contained the provision that the contractor "must begin work within twenty days after notification that his bid has been accepted, unless hindered by high water."

They were advised by the ninth specification so exhibited that their contract would provide "that additional time may be allowed to a contractor for beginning or completing his work in cases of delay from 'freshets, ice, or other force or violence of the elements, and by no fault of his or their own.'"

VII.

The condition of the Ohio River was during the season of 1888, the period of the last extension, unusual and unprecedented for repeated and

continued freshets and high water, overflowing the cross dam aforesaid; in consequence of which freshets and high water the working season of 1888, in the Ohio River at Louisville, Ky., was limited to about thirty-five days, mostly in July and August, as will more fully appear from the official monthly report of the defendants' officers of the progress of the work (known as section 3) from December, 1887, to December, 1888, as follows:

"DECEMBER, 1887.

"On section 3, Gleason & Gosnell, contractors, very little was done in December, except the removal of loose material which had been left above grade and in getting out machinery in anticipation of closing for the season. The water is several feet deep over both sections."

* * * * * * *

59 "MARCH, 1888.

"The stage of the river has prevented any work being done on the contracts of John Molloy, Gleason & Gosnell, and the Salem Stone and Lime Co."

* * * * * * *

"APRIL, 1888.

"No work has been done by the contractors on account of high water in the upper section."

* * * * * * *

"MAY, 1888.

"No excavation has been made by the contractors for the upper sections on account of high water."

* * * * * * *

"JUNE, 1888.

"On section 3, Gleason & Gosnell, contractors, a temporary earth dam has been constructed, the pumps started, and drilling on high points of rock begun. The first blasting was done June 30th."

* * * * * * *

"JULY, 1888.

"On section 3, Gleason & Gosnell, contractors, drilling on high points of rock was continued and a temporary dam of earth finished. The pit was pumped out and tracks surfaced. The contractors were run out by high water on the 11th instant and have not resumed."

* * * * * * *

"AUGUST, 1888.

"On section 3, Gleason & Gosnell, contractors, excavation was continued until the 18th of August, on which date the work was flooded by high water."

* * * * * * *

"SEPTEMBER, 1888.

"On section 3, Gleason & Gosnell, contractors, no work has been done since the contractors were run out by high water in August."

* * * * * * *

"OCTOBER, 1888.

"On section 3, Gleason & Gosnell, contractors, a temporary earth dam was begun on October 5th. The contractors' pump was started on October 9th and on the 11th the river washed away the dam, since which time no work has been done."

* * * * * * *

"NOVEMBER, 1888.

"On section 3, Gleason & Gosnell have done no work since October 11th. The river has been over their section since that date."

* * * * * * *

"DECEMBER, 1888.

"No work has been done by the contractors during the month. The contract of Gleason & Gosnell expired on December 31st."

* * * * * * *

VIII.

During the working season of 1888 the claimants were diligent in the prosecution of work embraced in the contract, in preparing therefor, and in endeavoring to exclude the water and freshets of the river.

They provided for the additional plant mentioned in their application for extension and had it ready for operation at the beginning of the season of 1888. But there was insufficient working time to complete the work by December 31, 1888, at the rate of 640 cubic yards for each practicable working day of twenty-four hours, and this from no fault of the claimants during the last extension of their said contract. No
60 act or omission of the claimants during the period of the last extension made it impossible to complete the work by December 31, 1888.

IX.

The force of the defendants' officer in charge of this same work after December 31, 1888, was, by reason of the overflow of the river, compelled to cease the work of excavation, to wit, in 1889 and 1890, at stages of water at from 6.1 to 6.10 feet, and they did not complete the work in three seasons subsequent to said 1888.

X.

After the working season of 1888 the claimants, through the personal solicitation of their attorneys, Bodley & Simrall, applied to the engineer in charge for an allowance of additional time for the completion of the work agreed upon in the contract so extended for the reason that they had been, by freshets and force and violence of the elements and by no fault of their own, prevented from completing the work at the time agreed upon in the contract, whereupon the engineer in charge refused to allow such additional time.

The defendants, nor the engineer officer in charge on their behalf, did not annul or terminate the contract as therein provided for by reason of

any delay or for any want of faithfulness or diligence on the part of the claimants in the prosecution of the work thereunder during the period of the last extension of said contract, but based his refusal to further extend the contract because, as he asserted, the claimants had for a number of seasons failed to complete the work within the times agreed upon.

No judgment or decision was given by said engineer on the question as to whether the (J. R.) claimants w're prevented by freshets and force and violence of the elements during the season of 1888 from completing the work agreed upon within the period limited by the last extension of the contract, nor did he find or decide that the claimants were not so prevented.

XI.

The amount of the reserved 10 per centum under said contract is $3,011.99, and has never been paid by the defendants to the claimants.

XII.

The total amount of rock in the area covered by the contract, as finally estimated by the defendants, was 118,935.22 cubic yards, of which the claimants had removed 35,435.22 cubic yards, leaving unremoved at the end of the season of 1888, 83,500 cubic yards.

XIII.

The cost to the claimants of performing this remaining work, 83,500 cubic yards, would have been $1.25 per cubic yard, and their total loss thereon at the contract price therefor would have been 40 cents per cubic yard, or $33,400.

XIV.

Under the specifications (2), made part of the contract and set out in the petition aforesaid, it is provided that "All material excavated under this contract will be the property of the contractor, and must be disposed of in such a manner as not to interfere with navigation, of which the engineer in charge shall be the judge. The contractor is forbidden to deposit any excavated material on canal property without permission."

61 Every yard of solid rock would have produced, by crushing, 1½ yards of broken stone, and upon this basis the remaining rock in the area covered by the contract at the end of the season of 1888 would have produced 125,250 cubic yards of broken stone.

XV.

The rock, when excavated and crushed, was a valuable commodity, for which there was a ready market in Louisville at $1.25 per cubic yard.

XVI.

The cost to the claimants of crushing and delivering the rock for the market aforesaid was 50 cents per cubic yard and the net value to the claimants of the crushed and delivered rock was 75 cents per cubic yard,

or $93,937.50, less the loss of $33,400, as set forth in Finding XIII, leaving $60,537.50 as the claimants' net profit under the contract for the remaining work.

XVII.

From the foregoing official reports, as well as from the other facts found herein, the court finds the ultimate fact that the condition of the river was as herein set forth; and the time remaining for active work, after deducting the time when it was impossible to do work by reason of the high water and freshets, was insufficient for the completion of the work under the contract within the period of extension, and that it was impossible for the claimants to complete the work within the working time thus remaining.

Lower work—Case No. 17783.

XVIII.

On January 13, 1887, Lieut. Col. William E. Merrill, Corps of Engineers, United States Army, for and on behalf of the United States, party of the first part, and John R. Gleason and George W. Gosnell, partners, of the second part, entered into the contract and specifications set out in full with and made part of the petition herein, whereby the claimants agreed to commence work thereunder on or before the 1st day of February, 1887, and to make 124,000 cubic yards, more or less, of earth excavation and 13,000 yards, more or less, of solid rock excavation "for enlarging the basin of the Louisville and Portland Canal at the head of the locks," as therein provided for, at and for the rate of 17½ cents per cubic yard for earth excavation and $1.05 per cubic yard for solid rock excavation, "measurements to be made in place," and to complete the same on or before December 31, 1887.

Said contract further and among other things provided:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties (or either of them) of the second part, and upon
62 the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the material be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States (provided, however, that if the party or parties), of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the

materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

XIX.

The season from February, 1887, to December 31, 1887, was favorable for the character of work specified in said contract, though the claimants failed to complete the same, and on December 28, 1887, they requested an extension of time until June 1, 1888, for the reasons set forth in their communication, as follows:

"LOUISVILLE, KY., *Dec. 28th, 1887.*

"Major AMOS STICKNEY,
"*Corps of Engineers, U. S. A.*

"DEAR SIR: We respectfully ask an extension of time on our contract for digging the basin at the locks in the Louisville and Portland Canal until the 1st of June, 1888, for the following reasons:

"There was so much work being done on railroads during the last year throughout the State that labor was exceedingly hard to obtain. We used every effort to secure the required amount of labor on our contract, but found it impossible to do so. We even employed agents in New York and other cities to procure and ship labor to us here, and then we found it very difficult to hold the labor we obtained, although we paid more than contractors paid for labor on railroads. Besides, the summer season was excessively hot—so very hot that for sixty or ninety days, in many instances, the men would work only two or three hours a day. We expect, however, to be able to finish the basin by the 1st of June, 1888.

"Very respectfully,

"GLEASON & GOSNELL."

Which letter was forwarded to the Chief of Engineers, with the following letter:

"U. S. ENGINEER OFFICE,
"*Louisville, Ky., December 31st, 1887.*

"The CHIEF OF ENGINEERS, U. S. ARMY,
"*Washington, D. C.*

"GENERAL: I have the honor to forward herewith an application of Gleason and Gosnell for an extension of time for completion of their contract for enlarging the basin of the Louisville and Portland Canal.

"This work is pretty well advanced, and nothing would be gained by a denial of this request. I therefore recommend that the time be extended to June 1st, 1888, upon condition that the contractors bear all extra expense to the United States caused by the extension of time, such expense to be deducted from their payments.

"Very respectfully, your obdt. servant,

"AMOS STICKNEY,
"*Major of Engineers, U. S. A.*"

The extension of time so requested and recommended to June 1, 1888, was granted and approved by the Chief of Engineers.

63 Not having completed their contract so extended, they, on May 29, 1888, requested a further extension to August 31, 1888, for the reasons set forth in their communication, as follows:

"LOUISVILLE, KY., *May 29th, 1888.*

"Major AMOS STICKNEY,

"*Corps of Engineers, U. S. A.*

"SIR: We respectfully ask further time, until August 31st, 1888, to complete our contract to widen the canal at the locks of the Louisville and Portland Canal, for the following reasons, viz:

"We were unable to do any work during the winter months, and lost the entire month of March, owing to continued rains, high water, and leakage through the canal wall, caused by the slope left behind the canal wall (which was the only protection we had to keep the water out) being composed largely of slate and rock instead of earth.

"Being somewhat cramped for dump room, frequent changes of track prevented us from working as big a force as desirable.

"Hoping these will be sufficient reasons for granting the additional time asked for, we are,

"Very respectfully,

"GLEASON & GOSNELL."

Which communication was forwarded to the Chief of Engineers by Major Stickney with the recommendation that the same be granted, saying, "It is believed the interests of the Government will be best served by granting the extension."

The request so made was granted and approved by the Chief of Engineers and the time extended accordingly.

The claimants, however, failed to complete their contract within the time so last extended, and August 29, 1888, they requested a further extension to December 31, 1888, for the reasons set forth in their letter, as follows:

"LOUISVILLE, KY., *August 29th, '88.*

"Maj. AMOS STICKNEY,

"*Chief U. S. Engineers, Louisville, Ky.*

"DEAR SIR: We respectfully request an extension until December 1st, 1888, of the time for completing work under our contract with the United States Government to enlarge the canal basin adjoining the Shippingsport locks of the Louisville and Portland Canal. Our reasons for this are that the high water from the Ohio River has upon two occasions since June 1st last prevented work and rendered the completion of it impracticable. We endeavored to stop the leaks from the canal wall, which flooded the space where we were working, but could not succeed in doing so. On account, also, of the limited space for dumping material as required by the contract, the force engaged upon the work was not so large as we should otherwise have employed; and this has concurred, with the flooding, to delay the completion of our undertaking.

"Trusting that these reasons will be deemed sufficient to warrant the extension asked, we remain,

"Very respectfully,

"GLEASON & GOSNELL."

Which letter was forwarded by Major Stickney to the Chief of Engineers with a recommendation that the same be granted, "with the provision that their work shall be so arranged as not to interfere with such other work as may be undertaken under the new appropriation, and that all extra cost to the United States by reason of the extension of time shall be charged against them and deducted from their payments," and the extension was granted accordingly by the Chief of Engineers.

64

XX.

The condition of the Ohio River during the season of 1888 was unusual and unprecedented for repeated and continued freshets and high water, in consequence of which the claimants were, during the period of the last extension of their contract, by freshets or force and violence of the elements and by no fault of their own, prevented from completing the work at the time agreed upon in the contract as extended.

XXI.

At or near the end of the year 1888 the claimants, through the personal solicitation of their attorneys, Bodley & Simrall, applied to the engineer in charge for an allowance of additional time for the completion of the work agreed upon in the contract, for the reason that they had, by reason of freshets and force and violence of the elements, and by no fault of their own, been prevented from completing the work at the time agreed upon in the contract as extended, whereupon the engineer in charge refused to allow such additional time.

The defendants nor the engineer officer in charge on their behalf did not annul or terminate the contract as therein provided for by reason of any delay or for any want of faithfulness or diligence on the part of the claimants in the prosecution of the work thereunder during the period of the last extension of said contract, but based his refusal to further extend the contract because, as he asserted, the claimants' had for a number of seasons failed to complete the work within the times agreed upon.

No judgment or decision was given by said engineer on the question as to whether the claimants were prevented by freshets and force and violence of the elements during the season of 1888 from completing the work agreed upon within the period limited by the last extension of the contract, nor did he find or decide that the claimants were not so prevented.

XXII.

The force of the United States engineer in charge of the work subsequent to 1888 did not complete the remaining work during the season of 1889.

XXIII.

The amount of reserved 10 per cent is $2,401, and has not been paid by the defendants to the claimants.

XXIV.

The amount of rock excavation covered by the contract was 13,000 cubic yds., of which the claimants excavated 3,575 cubic yds., leaving still to be excavated 9,425 cubic yds.

The cost to the claimants of completing the rock excavation, being slate, would have been 75 cents per cubic yd., and their net profit at the contract price would have been 30 cents per cubic yd., or $2,827.50.

65 XXV.

The claimants excavated 120,052 cubic yards of earth at no profit, their only profit being in the work on the rock excavation, as aforesaid. What it would have cost to complete the remainder of the earth excavation does not appear.

CONCLUSIONS OF LAW.

Upon the foregoing findings of fact the court decides as conclusions of law:

1. That in case No. 17782 the claimants are entitled to recover on Finding XI the retained percentage, amounting to $3,011.99, and on Finding XVI, as the net profits on the contract, $60,537.50.

2. That in case 17783 the claimants are entitled to recover on Finding XXIII the retained percentage, amounting to $2,401, and on Finding XXIV in said last-named case the further sum of $2,827.50.

3. In both cases the claimants are entitled to recover judgment on Findings XI, XVI, XXIII, and XXIV, in the aggregate, for the sum of sixty-eight thousand seven hundred and seventy-seven dollars and ninety-nine cents ($68,777.99).

VI.—*Opinion.*

PEELLE, J., delivered the opinion of the court:

These actions grow out of alleged breaches by the defendants of two separate contracts entered into by them with the claimants, the first of which, dated August 4, 1885, was for the excavation of 110,000 cubic yards, more or less, of rock excavation, "in the enlargement of the Louisville and Portland Canal," in Kentucky, the work thereunder to be completed on or before December 31, 1886.

The second contract, dated January 13, 1887, was for the excavation of 124,000 cubic yards, more or less, of earth and 13,000 cubic yards, more or less, of solid-rock excavation, "for enlarging the basin of the Louisville and Portland Canal at the head of the locks," which work was to be completed on or before December 31, 1887.

Both contracts were extended, the first twice and the second three times, the last extension of the first contract being to December 31, 1888, and the last of the second contract to December 1, 1888.

During the season of 1888, the period of the last extensions, the condition of the Ohio River "was unusual and unprecedented for repeated and continued freshets of high water," in consequence of which the working season in the Ohio River at Louisville, Ky., was limited to about thirty-five days, and by reason of which the claimants, without any fault on their part, were prevented from completing the work within the time agreed upon in the contracts as last extended.

At and after the expiration of the contracts so extended the claimants, through the personal solicitations of their attorneys, applied to the

engineer in charge for an allowance of additional time for the completion of the work agreed upon, for the reason that they had been, by freshets, high water, or other force of the elements, and by no fault of their own, prevented from completing the work within the time agreed upon, but the engineer officer in charge refused to allow any additional time,
66 basing his refusal on the claimants' failure to complete the work within the times agreed upon prior to the last extensions.

Before the first contract was entered into the engineer in charge prepared specifications for the information of bidders, which the claimants examined and on the faith of which they entered into the contract. These specifications provided, among other things, that their contract would provide "that additional time may be allowed to a contractor for beginning or completing his work in cases of delay from freshets, ice, or other force or violence of the elements, and by no fault of his or their own."

There was no such provision in the specifications exhibited for the information of bidders before the second contract was entered into, but both contracts contained the following provision:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties (or either of them) of the second part, and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the material be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States; provided, however, that if any party or parties of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

By reason of the proviso to the paragraph of the contract just quoted, the claimants contend that, notwithstanding the extensions theretofore granted, they were entitled, by reason of the delay caused by the freshets aforesaid, to an allowance of additional time within which to complete the work agreed upon in the contract last extended, and that the refusal of the engineer officer in charge to allow additional time was a breach of

the contracts on the part of the defendants, resulting in great damage to the claimants in the loss of profits which would have accrued to them had such additional time been allowed.

The defendants contend that, in the absence of fraud, actual or constructive, the decision of the engineer officer in charge in refusing an extension of time for the completion of the work under the contract is final and conclusive and can not be reviewed by this court.

As to whether the extensions or allowances of additional time prior to December, 1888, were or were not granted on sufficient grounds, we are not called upon to decide. Nor is it necessary for us to consider the question as to whether the defendants' officers had the right, except in the manner provided by Revised Statutes, section 3709, to impose new conditions as the basis of an extension, as appears to have been done in the case of the first contract.

67 Both parties treat the extensions as having been made on sufficient grounds, and once consummated, the contract provides that "such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

So that, for the purpose of these cases, we have only to do with the contracts as last extended; and in this respect we will consider the several dates for the completion of the work in December, 1888, as though they were the dates originally agreed upon in the contracts.

Whatever delays or defaults on the part of the claimants may have occurred prior to the last extensions of the contracts were waived by the defendants when the extensions thereof were granted; no forfeitures were declared at the time, and by the several extensions were waived, and once waived, can not be revived. (Pigeon's Case, 27 C. Cls. R., 167, 175.) So that the delay or diligence of the claimants in respect of the prosecution of the work could only be looked to by the officer in charge during the period of the last extensions.

In support of their contention the defendants have cited and rely upon a line of cases wherein it has been held in substance that "in the absence of fraud or such gross error as would imply bad faith" the decision of the engineer officer in charge in respect of quality and quantity of materials furnished and work done, or in any other matter wherein the parties have so agreed in the contract, shall be final.

In the case of Kihlberg v. United States (97 U. S., 398) a contract was made for the transportation of stores and supplies between certain points, providing that the distance should be "ascertained and fixed by the chief quartermaster." The distance was ascertained and fixed, but the same was less than by air line or the customary route, and for that reason objected to by the contractors; but the court held in substance (there being no fraud or gross error or failure to exercise an honest judgment) that the distance so fixed was final and conclusive, as the parties to the contract had agreed thereto.

This case was followed by the case of Sweeny v. United States (109 U. S., 618). In the latter case the contract provided that payments should not be made until some officer designated by the Government

should certify that the wall constructed "was in all respects as contracted for." The officer so designated expressly refused to give such certificate on the ground that "neither the material nor the workmanship were such as the contract required." The court held that in the absence of fraud or gross error the certificate was a condition precedent to payment.

That case was followed by the Martinsburg, etc., Co. v. March (114 U. S., 549), wherein the contract provided that the company's engineer should in all cases determine questions relating to the execution thereof, both as to the quantity of the several kinds of material and the compensation earned by the contractor, and that the same should be final and conclusive, and so the court held. Other like cases in principle are, Chicago, etc., Railroad Company v. Price (138 U. S., 185); Kennedy v. United States (24 C. Cls. R., 139); Ogden v. United States (60 Fed. Rep., 725); Elliott v. Railroad Co. (74 Fed. Rep., 707, 711); Gilmore v. Courtney (158 Ills., 432, 437).

68 The decisions cited, and upon which the defendants rely, grew out of the construction of contracts wherein the parties thereto, in terms, agreed, in respect of the subject-matter thereof, that the decision of the officers therein named should be final and conclusive, or should determine the question involved, as in the cases respectively stated.

In the case at bar a provision in the contract provides:

"All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final."

By that provision of the contracts the parties, in terms, agreed that the decision of the engineer officer in charge "as to quality and quantity shall be final," so that a contractor entering into such a contract could not, "in the absence of fraud or such gross error as would imply bad faith," be heard to complain of such decision, and in effect such are all the decisions cited.

But in respect of the provision of the contracts in the cases at bar, where no additional time whatever was allowed, we are clear that those decisions do not apply.

Had the engineer officer in charge exercised his judgment in the allowance of some additional time, though inadequate, a different question would be presented; but when he failed to exercise his judgment in this respect, by refusing to allow any additional time, he did so in the face of conditions disclosed by his own reports or those of his subordinates, set forth in Finding VII, which entitled the claimants, if the provision means anything, to additional time.

The engineer in charge was, by the first provision of the paragraph of the contract quoted, made the judge as to whether the claimants had faithfully and diligently prosecuted the work "in accordance with the specifications and requirements of the contract;" and if in his judgment they had not so prosecuted the work, the defendants were by the terms of the contract given the "power, with the sanction of the Chief of Engineers, to annul" the contract in the manner therein provided. To this the claimants had agreed, and the engineer's decision therein would have been final.

But if the claimants were, "by freshets, ice, or other force or violence of the elements," and by no fault of their own, prevented from completing the work at the time therein agreed upon, the judgment of the engineer officer in charge was to be exercised, not in the annulment of the contract therefor, but in the allowance of such additional time as in his judgment "shall be just and reasonable."

If one enters into a contract possible of performance and such performance be prevented by the act of God, it is well settled that no breach can be assigned therefor, although no reference be made thereto in the contract. (McDermott v. Jones, 2 Wall., 1, 7; Satterlee, administrator, etc., v. The United States, 30 C. Cls. R., 31, 50, and authorities there cited; Cobb v. Harman, 23 N. Y., 150.)

In the cases at bar, however, the contracts in terms provide that "additional time may in writing be allowed" for the completion of the work if prevented therefrom "by freshets, ice, or other force or violence of
69 the elements" and by no fault of their own; not that such additional time may or may not be allowed as the engineer in charge may determine, but that "such additional time may in writing be allowed" as in his judgment "shall be just and reasonable."

The language taken together leaves no discretion in the officer except in respect of the additional time to be allowed, and even that, the contract provides, "shall be just and reasonable."

The claimants in effect agreed that no additional time should be allowed them except on condition that they were prevented from the completion of the work (1) "by freshets, ice, or other force or violence of the elements," and (2) by no fault of their own; and to hold, when those conditions are present, that it is within the discretion of the engineer in charge to say whether any or no additional time may be allowed would be to eliminate that mutuality essential in conscionable contracts.

Hence, taking into consideration the circumstances of this case, and to effectuate the intention of the parties gathered from the contracts as a whole, we must hold that the word "may" should be construed to mean "shall."

As to what additional time would be just and reasonable he, as the engineer officer in charge, was to determine, not by the exercise of arbitrary power, but by the exercise of a just and reasonable judgment; and any aditional time thus allowed would have been final.

To this the parties to the contract had agreed, and the claimants were therefore entitled to have the engineer officer exercise his judgment in this respect. (Crane Elevator Co. v. Clark, 80 Fed. Rep., 705, 708.)

True, as the officer and agent of the defendants, he was bound, as between himself and his principal, to fairness and good faith (Hume v. United States, 132 U. S., 406), but that did not deprive him of the right, but rather enjoined upon him the duty under the contract, of dealing justly and fairly with the claimants, as by the terms of the contracts whatever additional time he allowed was to be equally binding on the defendants; and in this respect the officer was the arbitrator to whom the question was referred by the parties to the contracts, and by whose decision, in the absence of fraud, they mutually agreed to be bound (Gordon v. United States, 7 Wall., 188, 194); but he was not made an arbitrator to annul or terminate the contracts on the grounds made the

basis for an allowance of additional time; nor on the ground of delinquencies in previous years, as the extended contracts were, in respect of their several dates, new contracts, the performance or nonperformance of which did not depend upon anything done or omitted to be done thereunder prior to the last extensions.

Notwithstanding this, the engineer in charge annulled the contracts on the grounds of delinquencies in previous years, as before stated. The claimants had made no agreement to this effect, and it is only by the mutual assent of the parties that a contract can be modified or annulled. (Utley v. Donaldson, 94 U. S., 29; Wheeler v. New Brunswick Co., 115 U. S., 29.)

The engineer officer having himself or through his subordinates reported from month to month during the period of the last extension of the contracts, as set forth in the findings, that the claimants had, by reason of freshets and high water, been prevented from completing the work at the time therein agreed upon, thereby conceded that the condition or events provided against in the contracts and made the grounds or basis for an allowance of additional time had occurred, and in the absence of fraud or gross error, not contended in these cases, was binding on the defendants and not open to dispute.

In the construction of contracts courts consider not only the language employed, but the subject-matter and the surrounding circumstances, and thereby avail themselves of the light which the parties possessed when the contract was entered into. Merriam v. United States (107 U. S., 437); United States v. Gibbons (109 U. S., 200); Mobile & M. R. Co. v. Jurey (111 U. S., 584).

And courts apply the same rules of construction to contracts made by the United States as to those between individuals (United States v. Smoot, 15 Wall., 36), and they are liable in damages for a breach of their contract on the same principles and to the same extent as a private party. (Chicago R. R. Co. v. United States, 104 U. S., 680, 685; United States v. Smith, 94 U. S., 214.)

In thus viewing the contracts we find that the excavation to be done thereunder was of earth and rock in the bed of the Ohio River exposed to great force of the river in times of freshets and high water, the performance of which work necessitated the expenditure of large sums of money both in the preparation for and in the prosecution of the work, and it was doubtless because of these foreseen probable difficulties that provision was made in the contracts for additional time in case the claimants should, "by freshets, ice, or other force or violence of the elements," be prevented either from commencing or completing the work at the time therein agreed upon.

This, it seems to us, was the manifest intention of the parties by the words used, and to give effect thereto is the controlling consideration in the construction of contracts. (Canal Co. v. Hill, 15 Wall., 94, 103.)

The whole contract is to be considered, the purpose of it, the subject-matter, and the surrounding circumstances, and each part so construed with the others that all may be given effect, if possible.

Thus viewing the contract and the specifications made part thereof, we are of the opinion that the refusal of the engineer officer in charge to allow such additional time as, in his judgment, was "just and reasonable"

constituted a breach of the contracts on the part of the defendants, resulting, as the claimants contend, in the loss of profits which they would have realized as the fruits thereof had they been permitted to complete the work thereunder.

This brings us to the question as to whether the damages thus sustained are recoverable—i. e., are they the natural and proximate consequence of the breach?

On this point we think there can be no controversy, for by the annulment of the contract the claimants were compelled to cease the work of excavation thereunder; and while this of itself resulted, as the findings show, to their benefit in preventing them loss on the work of excavation, it also resulted in depriving them of the material which, by the terms of the contract and as part of the consideration therefor, became their property when excavated.

71 "If the outlay equals or exceeds the amount to be received, of course there can be no profits." (United States v. Behan, 110 U. S., 338, 345.) But if the amount to be received exceeds the outlay, then the difference, making reasonable deductions within the rule next stated, will be the amount of profits recoverable.

The ordinary rule for the measure of damages in such cases is "the difference between the cost of doing the work and what the claimants were to receive for it, making reasonable deductions for the less time engaged and for release from the care, trouble, risk, and responsibility attending a full execution of the contract." (United States v. Speed, 8 Wall., 77, 84; Masterson v. Mayor of Brooklyn, 7 Hill, 69.)

The latter, the court in the preceding case says, is the leading one on the subject.

In the case of United States v. Behan (110 U. S., 338, 344), where a contract was made for the improvement in the harbor at New Orleans, and the contractor was, without any fault on his part, prevented from performing the contract, the court stated the rule for the measure of damages thus:

"The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already expended toward performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of Masterson v. Mayor of Brooklyn (7 Hill, 69), they are 'the direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' * * *

"When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he can not recover any damages for a breach of the

contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a quantum meruit. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed."

Under the contract in the first case at bar, however, there is an element of damage which arises under the second specification, made part of the contract, and set out in Finding XIV, which reads:

"All material excavated under this contract will be the property of the contractor, and must be disposed of in such a manner as not to interfere with navigation, of which the engineer in charge shall be the judge. The contractor is forbidden to deposit any excavated material on canal property without permission."

Under that provision the claimants contend that they are entitled (1) to the increase in the cubic contents of the rock by crushing and (2) to the reasonable profit thereon at the place of delivery.

In legal effect the material excavated became a part of the consideration therefor, and the claimants being prevented from the completion of the work without any fault on their part thereby suffered the loss of the profits they would have made on such excavated material had they been permitted to complete the work under the contract as last extended.

72 That such loss resulted from the natural and proximate consequence of the breach we think there can be no question, and the claimants are therefore entitled to recover damages therefor, measured by the rules stated.

The cubic contents of the excavated material, the findings show, would have increased by crushing one-half, i. e., 1 cubic yard of material as excavated would make by crushing 1½ cubic yards of broken stone; and that when so crushed was a valuable commodity for which there was a ready market in Louisville, Ky., at $1.25 per cubic yard.

The cost of crushing the excavated material and delivering the same in the market at Louisville would have been 50 cents per cubic yard of the crushed material, leaving as the claimants' net profit thereon 75 cents per cubic yard.

The specifications providing that "all material excavated under this contract will be the property of the contractor" no doubt influenced the claimants in making the bid of 85 cents per cubic yard for such excavation, as otherwise they would have lost on the contract, as the findings show, 40 cents per cubic yard, or $33,400.

The claimants having made their bid and entered into the contract on the faith of the specifications, we think they are entitled to recover the profits which would have accrued to them on the excavated and crushed material had they been permitted to complete the work, less the amount they would have lost on the work of excavation, leaving as their net profit thereon the sum of $60,537.50.

Under the second contract the claimants' bid for rock excavation was $1.05 per cubic yard, and the rock to be excavated was slate, or of a

slaty character, and could, as the findings show, have been excavated for 75 cents per cubic yard.

As to the amount of $2,827.50, in Finding XXIV, being the difference between the cost of completing the excavation and what the claimants were to receive therefor under their contract in case No. 17783, we think that comes clearly within the authorities cited, and the same is allowed.

As to the retained percentage in both cases, amounting to $5,412.99, as set forth in Findings XI and XXIII, the defendants concede that under the decisions in the cases of Van Buren v. Diggs (11 How., 461, 477); Pidgeon v. United States (27 C. Cls. R., 167); Satterlee v. United States (30 C. Cls. R., 31, 50), and Kennedy v. United States (24 C. Cls. R., 122) the claimants are entitled to recover.

In the latter case the court said: "The 10 per cent reserved until the completion of the work, though declared forfeited by the agreement in case of its annulment, must be treated as a penalty and not as liquidated damages."

That case was ruled by the decision in the case of Van Buren v. Diggs (supra), in which the court said: "The clause of the contract providing for the forfeiture of 10 per centum of the amount of the contract price upon a failure to complete the work by a given day can not be properly regarded as an agreement or settlement of liquidated damages. The term forfeiture imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract or from an imperfect performance. It applies an absolute infliction, regardless of the nature or extent of the causes by which it is superinduced."

"Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced, where this can be done, in its real character, viz, that of penalty."

As there was no such agreements or declarations by the parties in either contract, the 10 per centum retained must be treated as a penalty; and as the defendants are not claiming damages for the claimants' failure to complete the work under the contract, there can be no retention by way of recoupment, and hence they are entitled to recover therefor.

The total amount recoverable in both cases, as stated in the last conclusion of law, is $68,777.99, for which judgment will be entered.

73 VII. *Judgment of the court.*

JOHN R. GLEASON AND GEORGE W. GOSNELL
vs.
THE UNITED STATES. } Nos. 17782 and 17783, consolidated.

At a Court of Claims held in the city of Washington on the 6th day December, A. D. 1897, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimants and do order, adjudge, and decree that the claimants, John R. Gleason and George W. Gosnell do have and recover of and from the United States the sum of sixty-eight thousand seven hundred and seventy-seven dollars and ninety-nine cents ($68,777.99).

BY THE COURT.

74 VIII. *Defendants' motion for new trial, filed Feb. 8, 1898.*

Come now the defendants, by their Attorney-General, and, under and pursuant to the provisions of section 1088 of the Revised Statute of the United States, allege that wrong and injustice has been done the United States in the judgment heretofore rendered against them in the above-entitled cause, in this, to wit, that the court found a fact that:

"The defendants, nor the engineer officer in charge on their behalf, did not annul or terminate the contract as therein provided for by reason of any delay or for any want of faithfulness or diligence on the part of the claimant in the prosecution of the work thereunder during the period of the last extension of said contract, but based his refusal to extend the contract on the claimants' failure to complete the work within the times agreed upon prior to the last extension."

Whereas in truth and in fact the said claimants did not perform nor prepare to perform the covenants, promises, and agreements made in their letter of December 31, 1897 (set out in Finding IV), nor were they prevented from so doing by freshets, ice, or violence of the elements or by causes beyond their control; and because they did not so perform, nor prepare to perform, and because they were not so prevented from performing, the defendants' engineer, among other reasons, exercised the discretion vested in him by the contract and declined to grant a further extension of time. These facts are established by the evidence already adduced and are conclusively shown in the affidavit of Amos Stickney procured since the rendition of said judgment, which said affidavit is as follows:

75 STATE OF MISSOURI, *City of St. Louis, ss:*

On this 5th day of January, 1898, personally appeared before me, a notary public, for and within the City of St. Louis and State aforesaid, Lieut. Col. Amos Stickney, corps of engineers, U. S. Army, who, being duly sworn, upon his oath says:

That his refusal to grant further extension of time for the completion of two contracts between the United States and Gleason and Gosnell for work of excavation connected with the Louisville and Portland Canal at Louisville, Ky., in the latter part of 1888, was based upon:

1st. The failure of said Gleason and Gosnell to either finish their work at the time called for by the last extension of said contracts, or to make proper provisions for carrying on the work.

2d. The said contractors did not fulfill the conditions upon which their time had already been extended.

3d. That the leniency already shown said contractors in extending one of the contracts twice and the other three times, had not brought forth such efforts on the part of the contractors as the circumstances required.

4th. That previous performances held out no hope of better efforts on their part.

5th. That the faults of the said contractors deprived them of the right to demand further extensions.

And he further states that he exercised his judgment in the fullest degree upon the contractual stipulation relating to extension of time, taking into consideration all of the facts of the case.

(Signed) AMOS STICKNEY,
Lieut. Col. of Eng'rs, U. S. A.

Sworn to before me and subscribed in my presence this 5th day of January, 1898.

GEORGE H. MILBURN,
Notary Public.

Wherefore, and in consideration of the premises and for the reasons set forth in defendant's motion for reformation of the findings of fact, this day filed, great wrong and injustice has been done the United States
76 and they ask that the judgment heretofore rendered against them in the above-entitled cause be set aside and that a new trial be granted to them.

L. A. PRADT,
Assistant Attorney-General,
By GEORGE H. GORMAN,
Special Attorney in Charge of Case.

APRIL 4, 1898.

Overruled.

C. C. NOTT, *Chief Justice.*

77 IX.—*Defendant's motion for reformation of findings of fact.—Filed February 8, 1898.*

Come now the defendants, by their Attorney-General, and move the court to amend and reform the findings of fact in the above-entitled cause in the following particulars, to wit, Findings V and XXI.

These findings should be entirely omitted. It is not a finding of fact at all, but a conclusion of law, merely. As it stands, the Supreme Court is told that this provision of the contract was, in fact, incorporated into all the agreements for extension of time. It has never been pretended by anyone that this was true, as a fact. If such provisions continued it could only be by operation of law. This is one of the principal contentions in the case, on the construction of the contract. It is improper to find it as a fact. (Burr & Des Moines, 1 Wall., 99–102; McClure v. U. S., 116 U. S., 145, 151.)

Finding IX.

This finding should be amended to read as follows:

The season of 1888 was an unfavorable one for the prosecution of this work, and the freshets of that year materially assisted in preventing the claimants from completing the work, but if they had provided themselves with suitable dams, and if they had performed the promises set out in the letter embraced in Finding IV, they could have worked at much higher stages of water and could have excavated considerable
78 more material. They did not perform the promises made in the aforesaid letter, either in the number of men to be employed, or in the capacity of the plant to be used; and their failure to do this was one of the reasons assigned by Col. Stickney for refusing to grant them additional time at the close of the season of 1888.

(See Record, pp. 217, q. 28, 29; 220, q. 52; 237, q. 38, et seq; 238, q. 44; 241, q. 75–77; 290, 291, 292. See affidavit of Stickney filed this day with motion for new trial. These facts are fully established.)

Finding VI.

Add to this finding, at the end thereof, the words:

The contractor relied upon this cross dam and upon the canal guiding dyke, and in the lower work upon the canal wall, for the purpose of keeping water out of the area to be excavated. These structures had been built for a great many years prior to the letting of this work, were constructed for entirely different purposes, to wit, to hold the water up in the canal at low stages, and they were entirely unsuitable for the purposes for which the contractors used them. Had the claimant, instead of relying upon these unsuitable structures (which they did voluntarily and without any inducements from defendants), provided himself with suitable and sufficient dams, he could have worked at very much higher stages of water, both in the year 1888 and previously.

(There can be no doubt about the truth of this statement. It is a fact, and a very important fact, and it should be so found. It was the principal cause of their failure to complete the work within the
79 required time. See Record, pp. 326, 327; 214, 215, q. 8 to 20. See Skelsey vs. U. S., 23 Ct. Cls., 61, 67. See Record, p. 241, q. 75 to 77.)

Finding XI and XXIII.

Omit the second paragraph in each finding and insert in lieu thereof the following:

In refusing to further extend the time for the completion of these works, the engineer in charge gave the following reasons:

1st. The failure of said contractors to either finish their work at the time called for by the last extension of said contracts or to make proper provisions for carrying on the work.

2nd. The said contractors did not fulfill the conditions upon which their time had already been extended.

3rd. That the leniency already shown said contractors in extending one of the contracts twice and the other three times had not brought forth such efforts on the part of the contractors as the circumstances required.

4th. That previous performances held out no hope of better efforts on their part.

5th. That the faults of the said contractors deprived them of the right to demand further extensions.

Finding XXII.

Omit this finding and insert in lieu thereof the following:

While the season of 1888 was unusually unfavorable for this character of work, and while such unfavorable weather retarded the work, it was not the sole cause of the failure of the contractors to complete the work during that season. One of the principal causes of their failure to complete said work was caused by a leak which occurred in the canal wall adjacent to the area to be excavated which constantly flooded said area
with water, the claimants being unable to stop said leak, but
80 which the Government officers stopped quickly and inexpensively after they took charge of said work upon the annulment of claimants' contract. In relying upon said canal wall to protect their work from flooding, the claimants exercised their own judgment, uninfluenced by any permission, promises, or representations from the defendants. The canal wall, built many years before the undertaking of this work, was a dry wall and wholly unsuited to purposes for which claimants relied upon it.

If, instead of relying upon said canal wall, as aforesaid, the claimants had provided themselves with proper dams for the exclusion of water from the site, they could have worked a much longer time during each season, including the season of 1888, than they did work, and could have excavated much a greater quantity of material than they did excavate.

(See Record, pps. 340, q. 9 to 21; 344 and 348, passim; 326 and 327, passim. See Defendants' Ex. No. 2, in case No. 17783, where these facts are abundantly established.)

L. A. PRADT,
Assistant Attorney-General,
By GEORGE H. GORMAN,
Special Attorney in Charge of Case.

APRIL 4, 1898. Allowed in part and overruled in part. See order filed this day, April 4, 1898.

BY THE COURT.

81 X.—*Order overruling motion for new trial and to amend findings of fact.*

At a Court of Claims held in the city of Washington on the 4th day of April, A. D. 1898, the motion of the defendants for a new trial in the above-entitled cause was overruled, and an order was filed amending certain of the findings of fact herein under the defendants' motion, and it was ordered that the findings heretofore filed be withdrawn and the amended findings filed in lieu thereof as of December 6, 1897.

BY THE COURT.

82 XI.—*Appeal by defendants from the judgment entered December 6, 1897, and allowance of same.*

From the judgment rendered in the above-entitled cause on the 6th day of December, 1897, in favor of the claimants, the defendants, by their Attorney-General, on the 5th day of April, 1898, make application for, and give notice of, an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Assistant Attorney-General,
By GEORGE H. GORMAN,
Special Attorney.

Filed April 5, 1898.

At a Court of Claims held in the city of Washington on the 5th day of April, A. D. 1898, Mr. Assistant Attorney-General Pradt presented the above application for the allowance of appeal, filed as of this date, and it was allowed as prayed for.

BY THE COURT.

APRIL 5, 1898.

83 XII.—*Appeal by defendants from the order overruling motion for new trial entered April 4, 1898, and allowance of same.*

From the judgment overruling the defendants' motion for new trial rendered in the above-entitled cause on the 4th day of April, 1898, in favor of the claimant, the defendants, by their Attorney-General, on the 5th day of April, 1898, make application for, and give notice of, an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Assistant Attorney-General,
By GEORGE H. GORMAN,
Special Attorney.

Filed April 5, 1898.

At a Court of Claims held in the city of Washington on the 5th day of April, A. D. 1898, Mr. Assistant Attorney-General Pradt presented the above application for allowance of appeal filed as of this date, and it was allowed as prayed for.

BY THE COURT.

APRIL 5, 1898.

84 In the Court of Claims.

JOHN R. GLEASON AND GEORGE W. GOSNELL
vs.
THE UNITED STATES. } No. 17782 and 17783, consolidated.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusions of law thereon, of the opinion of the court, of the judgment of the court, of the motion of the defendants for a new trial and the order of the court overruling said motion, of the applications of the defendants for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington this 13th day of April, A. D. 1898.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 16851. Court of Claims. Term No., 280. The United States, appellant, vs. John R. Gleason and George W. Gosnell. Filed April 18, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANTS,
v.
GEORGE R. GLEASON AND GEORGE W. Gosnell, appellees.
No. 59.

BRIEF OF ARGUMENT ON BEHALF OF THE APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal from two judgments rendered against the appellants by the Court of Claims for the alleged breach of two certain contracts made between the appellants and the appellees for the excavation of certain earth and rock material for the enlargement of the Louisville and Portland Canal at Louisville, Ky. Inasmuch as the same questions of law were presented in both cases, they were consolidated in the court below and heard together as one case.

Case No. 17782 is commonly called the "upper work." The work to be performed consisted of earth and rock excavation over an area of about 1,600 feet in length and about 450 feet in width and to a depth of about 4 feet. The object of the proposed excavation was to gradually increase the width in the navigable channel leading into the canal and incidentally to enlarge the harbor room at the port of Louisville, Ky.

Case No. 17783 is commonly called the "lower work." The work to be performed here consisted of the excavation of about 137,000 cubic yards of earth and rock for the enlargement of the basin of the Louisville and Portland Canal, at the head of the locks. The object of this proposed improvement was to create a large space in the canal where upgoing and downcoming boats would lie to and permit others to pass them. In the old state of the canal there was a width of only about 90 feet from the head of the lock to a point opposite the dry dock, which permitted the passage of only one vessel at a time. The enlargement of the basin just above the lock was to be made for the purpose of permitting vessels to pass at that point, and thus facilitate locking with greater rapidity.

The original contract for the upper work required that the appellants should commence work on or before August 20, 1885, and complete the same by December 31, 1886 (contract, record, p. 10). The season from August, 1885, was unusually favorable for the prosecution of this character of work, yet the contractors wholly, by reason of their own wrong, default, and neglect, failed to perform the work, and only completed 14 per cent thereof (Finding II, record, p. 31). Whereupon, as a

matter of grace, and without any pretence of right, they asked that the time for the completion of their contract be extended to December 31, 1887, which request was granted by the Government engineer in charge of the work, under certain conditions embraced in a supplemental contract (record, p. 32). Again the season was unusually favorable and again, by reason of their own default and neglect and not by reason of any fault or neglect on the part of the appellants, they failed to complete the work or to make any satisfactory progress in it; and again, as a matter of grace and without any pretense of right, they asked for a further extension to December 31, 1888, making profuse promises for the increase of the plant, working force, etc., and again, as a matter of grace, the time was extended upon the express condition that the appellees faithfully carry out the promises contained in their letter of application, and warning them that "any failure to carry out these promises will terminate your contract." (Record, pp. 16 and 17.)

The contract for the lower work provided (Record, p. 24) that the contractors should commence the work on or before February 1, 1887, and complete the same by December 31, 1887. The period embraced in the terms of this contract was favorable for the performance of the work and the failure of the claimants to complete the same was not in anywise due to the force or violence of the elements, but wholly to their own fault or neglect (Finding XIX, Record, p. 39). An extension of time was asked for the completion of this work to the 1st of June, 1888, said extension being requested purely as a matter of grace and without any pretense of right. And

similarly an extension was asked to August 31, 1888, and again to December 31, 1888, all of which said requests were granted as matters of grace, without any demand on the one part of recognition on the other of a legal obligation so to extend, the failure to complete the work within the various periods mentioned being wholly due to the fault of the claimants themselves and not in anywise chargeable to the appellants, or to the conditions of the weather (see Record, pp. 39 and 40.)

Thus we have the history of the two works done to the end of the season of 1888. That season was a very unfavorable one for the prosecution of this work, and the frequent freshets greatly hindered its performance. At the end of that season application was made for further extension of time within which to complete both works. It was refused. The Government engineer in charge of the work refused this request because (see Record, p. 51, folio 75) of the failure of the appellants to either finish their work at the time called for by the last extension of the contracts, or to make any proper provisions for the carrying on of the work; because the contractors did not fulfill the conditions upon which their time had already been extended; because the leniency which he had already shown the contractors in extending one of the contracts twice and the other three times had not brought forth such efforts on the part of the contractors as the circumstances required; because their previous performance held out no hope of better efforts on their part in the future, and because, in the exercise of his best judgment upon the stipulations of the contract, he did not

consider it just and reasonable that the contract should be further extended.

Both contracts provide that:

> If the party or parties of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable, but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

Under this clause of the contract, it is contended that the appellees were entitled to a further extension of the time within which to complete the work, because, notwithstanding their failure to perform their contractual covenants in the past, they were prevented, during the period of this last extension, from completing the works on account of ice and freshets, and were consequently entitled, as of right under this clause of the contract, to an additional extension of time. The Court of Claims concurred in this view, and held that the refusal of the appellants to further extend the time after the season of 1888 was a breach of the contract on their part, and proceeding upon the notion that the appellees were prevented from completing the work by the wrongful act of the appellants, the court below entered judgment in favor

of the appellees for what they are pleased to call the difference between the cost of doing the work and the contract price, amounting in the two cases to the sum of $68,777.99. From this judgment the case comes to this court upon appeal.

ASSIGNMENT OF ERRORS.

The court below erred:

1. In holding that there subsisted during the season of 1888 any contractual provision whereby the appellees became entitled as of right to a further extension of time by reason of the existence of ice, freshets, or the force and violence of the elements during that season.

2. In construing the word "may," as contained in the contract, to mean "shall."

3. In holding that the decision of the engineer in charge concerning the right of the appellees to a further extension of time was not final, but was subject to the review of the court.

4. In holding that the engineer in charge did not render a decision upon the question of whether or not the appellees were entitled to a further extension of time.

5. In holding that the refusal of the appellants' agent to further extend the time after the season of 1888 was a breach of the contract on the part of the appellants.

6. In rendering judgment against the appellants and in favor of the appellees in any sum whatsoever upon the facts found.

7. In rendering judgment in favor of the appellees and against the appellants in any sum beyond the total sum of $5,412.99.

BRIEF OF ARGUMENT.

The appellees were only entitled as of right under the contract to an extension of time for the commencement or completion of the work described, in the event that they were prevented from commencing or completing said work by reason of ice, freshets, or the force and violence of the elements, within the periods mentioned in the original contract; and if not so prevented during that period, there is no such right given to them in the future, unless again contracted for, although the time for completion was thereafter extended as a matter of grace.

The clause of the contract upon which the judgment of the court below is made to rest (Record, p. 11) is as follows:

> Provided, however, that if the party or parties of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time *may*, in writing, be allowed to him or them for such commencement or completion as, in the judgment of the party of the first part or his or their successors, shall be just and reasonable; but *such* allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

The court below held that this clause of the contract related, not only to the period of time embraced in the original contract, but also to all of the periods of time

embraced within the several extensions that were granted to the appellees for the completion of these works. They held that the word "may" must be changed to read "shall" and that the appellees, notwithstanding their failure to complete the work within the contractual time by reason of their own default and notwithstanding the generous extensions of time that had been granted to them, were yet still entitled as a matter of contractual right to some further extension whenever, at any time, the work was hindered or delayed by ice or freshets. We submit that this construction is wholly at variance with the letter and spirit of the contract, in violation of the letter and spirit of the various extensions of time that were given them and discordant with every inherent fact and circumstance surrounding the parties.

What was it that these men contracted to do?

On the upper work they contracted to begin work on or before the 20th of August, 1885, and to complete the same by the 31st of December, 1886; on the lower work they contracted to begin on or before February 1, 1887, and to complete the same by December 31, 1887. They further contracted that if they did not begin the work on those dates, or if they failed to diligently prosecute the same, the engineer in charge might annul the contract. It was further contracted that if they were prevented by ice floes, freshets, or the force and violence of the elements and by no fault of their own from commencing or completing the work on the above-recited dates, then they might be entitled to such additional time as the engineer in charge should deem just and

reasonable. It was also contracted that *such* an extension (that is, an extension given because they were unable to begin or complete the work on the above-recited dates by reason of the elements) should "not affect the rights and obligations of the parties, but that the *same* (i. e., the *rights and obligations*, not the *time*, as the court below states in its opinion) shall subsist and take effect as though it was the original date agreed upon."

It is admitted on all hands and is so found by the court (see Findings II and IX, record, pp. 31 and 39) that the time embraced in these contracts was a favorable one for the prosecution of this work, and that they were in nowise prevented from beginning or completing the same within the time therein mentioned by reason of the ice or freshets or the conditions of the weather, or by any cause beyond their own control. Their right to demand any extension of time for this reason was therefore at an end. And it was at an end for all time unless this contractual stipulation was expressly renewed by a subsequent covenant to that effect. This stipulation referred only to a right of additional time where the parties were prevented from commencing or completing the work within the time mentioned in *that* contract. The last clause of the contract providing that such extensions should not impair the obligations of the contract, but should subsist and take effect as though it was the date originally agreed upon, upon which so much stress is laid by the court below, refers only to *such* extension or change in dates as is mentioned in the preceding sentences, to wit, such additional time as the engineer might grant them

because of their having been prevented from commencing or completing the work *during the periods mentioned in the original contract.* It does not refer to *any* additional time given them *for any other reason*, nor does it refer to their being prevented from completing the work by reason of the condition of the elements at any other time than the times mentioned in the original contract. Not having been *so* prevented during *such* time and no *such* extension having been granted, this clause, of course, has no continuing effect. It is at an end. It can not be revived except by a new contractual stipulation of like import. This was never expressly done. (See record, pp. 32, 33, 39, and 40.)

In none of the correspondence or negotiations concerning the five extensions of time that were granted for the completion of the two works was there ever the slightest hint or suggestion that if the additional time asked for should be granted them as a matter of grace, they should still have a right to demand, as a matter of right, additional time in case they were prevented from completing the work within the extended period by reason of freshets, etc. If any such claim had been made, the extension, in all probability, would not have been granted, for the Government would not have tied itself up in this indefinite way, rendering it practically impossible to say when a work of great public improvement like this should ever be completed. No such claim was made by the contractors nor contemplated by the engineer in charge of the work, nor was such a claim ever made by anyone until the engineer in charge of the work, with his patience exhausted by the claimants' repeated failures and delays,

refused a further extension of time for the completion of this work; and then the claim is made, for the first time, not by the contractors, but by their learned counsel, whom they had sent to interview the engineer upon this subject. If it had been the intent of the appellees to make such a claim, or the intention of the defendants to grant the same, it must have been so conditioned in the supplemental contract of extension. Certainly there would be some evidence of such intent somewhere in the letters or negotiations concerning these various extensions. We look in vain for the slightest suggestion of such a thing, and the best evidence of the fact that no such intention or understanding existed is the absence of all reference to it in the negotiations of the parties.

But it is claimed that in extending the contract the appellants, impliedly if not expressly, extended all of the terms and covenants of the contracts, and that the words "at the time agreed upon in this contract" thereafter had reference by implication to the time agreed upon in the period of extension, so that if prevented during the period of extension from completing, by reason of ice, etc., they were as much entitled to such additional time as if they had been so prevented during the time agreed upon in the original contract. This is a complete *non sequitur*, and it is founded upon a misconception of fact. The appellants did not extend the contract in the sense of extending the legal rights and duties which flowed from it, but merely extended the time for the completion of the work described in the contract, and while, of course, the work was to be done in the manner set forth in the plans and specifications, and the payment for

the work was to be made in accordance with the provisions of the contract, yet it by no manner of means followed that all of the collateral covenants in the contract were impliedly continued in force by the parties in the absence of any express agreement to that effect. On the contrary, the logical conclusion is just the other way. This inference resolves itself into certainty when we observe what was done in the first supplemental contract that was made for the extension of time. In this very clause of the original contract upon which this judgment is founded it is provided that—

> If the parties of the second part shall delay or fail to commence with the delivery of the material or performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of the contract, then, in either case, the party of the first part, or his successor, legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties of the second part, and upon the giving of such notice all money or reserve percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States, and the party of the first part shall be thereupon authorized, if an immediate performance of the work or the delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed by section 3709 of the Revised Statutes of the United States.

Here is ample provision for taking the work away from the contractors, of having it done by others, and of charging up the cost to the appellees if they did not faithfully and diligently prosecute the work. Now if, when the time for the completion of this work was extended, it was intended to likewise extend all of the provisions and covenants of the original contract and to continue them all in force, pray what was the reason, necessity, or sense of drawing up a supplemental contract to allow the Government to do precisely the very thing which they were already allowed to do by the above recited provision of the original contract? And yet we find the parties doing this very thing. For in the supplemental contract it is provided (Record, p. 32) that—

> Should the said Gleason and Gosnel fail to employ a sufficient force, not less than three hundred men, or its equivalent in machinery, to finish their work in the required time, then the officer in charge shall be authorized to perform any of the work in his discretion and deduct the cost from any money due or to become due the said Gleason and Gosnel.

Surely there could be no greater proof that, in the opinion of the parties to the contract, the Government would have had no power to do this thing, notwithstanding the provisions of the original contract, unless provision were made for it when the time for the completion of the work was extended, and surely this is the best possible proof that the parties considered that only the time was extended and that the provisions of the original contract were not extended, except so far as embraced in

the supplemental agreements. And if it had been the intent to guarantee to the appellees during these periods of extension the benefit of the freshet clause of the original contract, would they not have provided for it in the supplemental contract, just as was done in the provision above recited? Certainly the best evidence that they did not intend to do it is to be found in the fact that they did not do it. Whatever fine-spun theories of construction may be evolved from these words in the original contract, we have here a practical solution in the construction placed upon the contract by the parties themselves. And it is well settled that the courts will follow such practical construction placed upon the contract by the parties thereto, even though the courts should not be inclined to concur in the same as a matter of legal construction. (See *Chicago* v. *Selden*, 9 Wall., at p. 54; *Toppliff* v. *Toppliff*, 122 U. S., 121; *District of Columbia* v. *Gallagher*, 124 U. S., 505.)

Another and perhaps the controlling reason for inserting the provision in the contract that such increase of time as might be granted by the engineer in charge should not "affect the rights or obligations of the parties, but that the same should subsist and take effect precisely as if the new date for such commencement or completion had been the date originally agreed upon," was to prevent the allowance of such additional time from having the effect of releasing the sureties on the contractors' bond, it being thoroughly well settled that where one is a guarantor on a bond, note, or other instrument for the payment of money, or performance of an obligation by

another, and the time for such payment or performance is changed or extended, without the knowledge and consent of the guarantor, the guarantor is thereby released from his undertaking. The guarantor's undertaking is to insure payment, or the performance by another in strict accord with the provisions of the instrument into which he enters; and the terms of such undertaking can not be varied without his consent, for he can not be forced into a new contract, and any attempt to do so releases him from his original obligation.

As was said by this court in *Sprigg* v. *The Bank of Mount Pleasant* (14 Pet., 201, at p. 208):

> It is no doubt a sound and well-settled principle that sureties are not to be made responsible beyond their contract; and any agreement with the creditor which varies essentially the terms of the contract, without the assent of the surety, will discharge him from his responsibility.

In accord: *George* v. *Andrews*, 60 Md., 26; *Calvo* v. *Davis*, 73 N. Y., 211.

And the desire to avoid this complication was doubtless the controlling reason for inserting the above-recited provision in this contract.

II.

But conceding that this provision of the contract continued in force by implication, still it only provided that in the event of the contractors being prevented by the condition of the elements and by no fault of their own, "such additional time may, in writing, be allowed them for such commencement or completion as in the judgment of the party of the first part shall be just and reasonable." In other words, the engineer in charge is vested with a discretion to extend or not to extend, according as he deems it to be just and reasonable, and his decision upon the subject is final and conclusive upon all the parties.

Under this provision of the contract, we submit that the engineer in charge is vested with a discretion—

First. To extend or not to extend the time for the commencement or completion of this work, according as he may deem it to be just and reasonable to do so or not to do so, under all the circumstances of the case; and

Second. That such decision by the engineer in charge is final and conclusive upon all the parties; that it is not subject to review by the courts, nor can the court set aside such decision because, had it been acting in the stead of the engineer, it would have come to a different conclusion.

First. The provision of the contract is (Record, p. 31):

> Provided, however, that if the party or parties of the second part shall, by freshets, ice, or other force or violence of the elements, and no fault of his or their own, be prevented either from commencing or

completing the work or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as in the judgment of the party of the first part or his successors shall be just and reasonable.

The court below (see opinion, p. 46, folio 69) deliberately changes the word "may" into "shall," thereby changing the permissible discretion into a contractual obligation; and because this discretion was not exercised by the engineer in consonance with the court's notion of "justice and right," they proceed to do what they think the engineer ought to have done, thereby substituting their discretion for that of the engineer, and of enforcing the contract, not as it was written by the parties to it, but in accordance with what the court thought ought to have been written by the parties. And this, we are blandly informed, is done "in order to effectuate the intention of the parties." *How* it effectuates the intention of the parties we are not told, and we look in vain to the instrument itself for any words that support such a notion. On the contrary, the language of the instrument, as well as every inherent probability of the transaction, points to the conclusion that it was the intent of the parties to confine the determination of the question to the engineer in charge. In all matters of estimates, whether of quantity, or of quality, or of method of workmanship, the contract makes his judgment final and conclusive, and in respect to this extension of time it is provided that such extension *may* be allowed as *he* thinks just and reasonable. "If the contract as written did

not express the true agreement, it was the claimant's folly to have signed it." (*Brawley* v. *The United States*, 96 U. S., 168, at p. 173. Quoted with approval in *Simpson* v. *The United States*, 172 U. S., at p. 379.)

As was said by this court in *Kihlburg* v. *The United States* (97 U. S., 401):

> Indeed, it is not at all certain that the Government would have given its assent to any contract which did not confer upon one of its officers the authority in question.

And it is certain that if this discretionary power had not been vested by the contract in the engineer officer in charge of the work no contract whatever would have been made with these claimants.

In *Carter* v. *Creek* (4 H. and N., 412, 417) Pollock, C. B., observed that "if a party seeks to make out that certain words used in a contract have a different acceptation from their ordinary sense he must prove it by clear, distinct, and irresistible evidence." This language is quoted with approval by this court (speaking through Mr. Justice Lamar) in *De Wit* v. *Berry* (134 U. S., 306 at p. 314), and it is universally held that the words of the contract are to be considered in their plain, usual, and ordinary sense. (*Am. Mfg. Co.* v. *Krantowich*, 77 Ill. App. (1899) and cases cited.)

Now, the word "may" naturally and ordinarily and properly means, "Is permitted to; has liberty to" (Bouv. Law Dic., ed. of 1897, 384), and it is used as merely permissive and discretionary; and while, in the interpretation of statutes with the wording of which the public has

naught to do, the word is sometimes construed in a mandatory or obligatory sense, in order to conserve previously existing rights (but never to create new rights), yet the reason for this rule can never exist in the interpretation of a contract the language of which is as much one party's as it is the other's and which is the joint and mutual agreement of both, which said agreement they jointly and mutually agree to express in a certain form of words. In every such case of contract the words employed must be read in their usual and ordinary acceptation in the absence of clear and convincing proof that they were intended to be understood in a different sense. Following this rule of construction, and conserving the evident intent of the parties as well, we submit that the word "may" means just what it ordinarily means in the affairs of life, and it was used to vest in the engineer a discretion to extend the time for the commencement or the completion of this work if, in his judgment, under all the circumstances of the case, he deemed it to be just and reasonable to do so. But in him alone rested this discretion. The contract does not, and did not design to, create any duty or obligation to extend the time. If such had been the intent of the parties, the whole English language was at their disposal in which to say so plainly and unmistakably. Slightly paraphrasing the language of Mr. Justice White in *Simpson* v. *The United States* (172 U. S., at page 381):

> If such had been the intent of the parties, a purpose so vital, so important, would necessarily have found direct and positive expression in the bid and

> specifications and would not have been left to be evolved by the forced and latitudinarian construction of the word "may."

The only change that is made in this phraseology is the substitution of the word "may" for the word "available." In the Simpson case an effort was made to elicit from the court a "forced and latitudinarian" construction of the word "available" in order to "effectuate the intention of the parties;" but the court said that the intention of the parties must be gathered from the instrument which they drew up, and denounced this attempt to supply the parties with hindsights in the above-quoted piece of virile English. Every word of the quotation is equally applicable here and we submit that the deliberate use of the word "may" was done in order to vest in the engineer in charge an absolute discretion to extend or not to extend the time for the completion of this work; and that when the engineer decided not to extend the time there was an end of the matter, for—

Second. Such decision is final and conclusive on all the parties and is not reviewable by the courts.

As was said by this court in *Quinn* v. *The United States* (99 U. S., at p. 32):

> It may be very well contended that the engineer in charge is, by the agreement of the parties, made the judge of the existence of "such delay or inability to proceed with the work in accordance with the contract" as justifies him in taking it away, and that his action in that regard is conclusive.

The court further says that the "counsel for the United States have not assumed that ground here, and it is not

necessary to the decision of this case," thus very plainly indicating that if such position had been taken and the decision of the point had been necessary the court would have so held.

This position has never been taken by counsel for the Government, so far as we have been able to find after considerable research among the cases and briefs of counsel; but we apprehend that the reason for it is to be found in the fact that no case precisely like the one at bar seems ever to have been litigated either in this court or in the Court of Claims. The position which has been taken by counsel for the Government in this class of cases is that, while the decision of the engineer in charge may be reviewed by the court under some circumstances, yet it can never be set aside except for actual or constructive fraud. But the court will observe that the decision of the engineer which is referred to in all of the cases in which this doctrine is announced by the court is a decision upon physical facts, such, for example, as measurements of earth or areas of excavation, or the quality and amount of work done and the giving of estimates upon the work done, or to be done, and the decisions upon questions of fact involving mathematical calculations, being in the nature of an award of the amount due to the claimants. In cases of this kind the courts have uniformly held that where the contract provides that the decision of the engineer in charge concerning these matters shall be final, said engineer acts in the nature of an arbitrator, and that when he makes his award under such contract, it is conclusive upon all parties, unless tainted with fraud or such

gross error as necessarily implies bad faith. But the decision of the courts in that class of cases can have no application to a case like the one at bar, where the decision sought to be reviewed is a psychological determination and not an action upon physical facts. It is not given to the courts to sound the depths of another's conscience with a plummet to determine whether his moral judgment was such as it ought to have been; nor, on the other hand, is it permitted to a court to place its moral instincts in the place of those of the person selected in the contract and to say that in its moral judgment such and such a thing ought to have been done because it was "just and reasonable." What is "just and reasonable" to one man may not be so to another; and we submit that when a question of that sort is left by the free contractual act of the parties to be determined by one person, his determination thereon is and ought to be a complete finality. The contract provides that the engineer in charge of the work shall be given the discretion (subject to the approval of the Chief of Engineers) to grant such extension of time as in his judgment he shall deem "just and reasonable." It does not provide that such extension may be given by him for reasons which any other person may deem just and reasonable, and for a court to undertake to pass upon that question would be for them to undertake to exercise that ministerial discretion which, by the contract, is vested in the Engineer only. This is not interpreting the contract; it is making a new contract. It is not the exercise of judicial functions, but of contractual rights.

We therefore submit that the determination of this question by the engineer in charge is final and conclusive, and can not be inquired into nor set aside by the court.

III.

Even if held to be reviewable, the decision of the engineer can not be avoided nor set aside, unless it affirmatively appears that such decision was brought about by actual or constructive fraud.

Even in those contracts where the engineer in charge is given power to decide upon questions of quantity, material, and measurement, it is uniformly held that such decision on the part of the engineer can only be set aside where the whole record discloses that his decision was brought about by fraud, either actual or constructive. This is sometimes stated by the courts in words which, at a cursory glance, would seem to indicate something less than fraud, but when the words are analyzed it will be seen that they mean fraud, either actual or constructive. For example, where the courts say that the engineer's decision will not be set aside except for fraud or such gross error or mistake as implies bad faith, or the failure to exercise an honest judgment, such language amounts to nothing more than to say that his decision will not be set aside except for actual or constructive fraud; for, of course, if the deciding person does not exercise an honest judgment, he must needs exercise a dishonest one, and if the facts are such as to show such a gross error as would imply bad faith, then the officer is guilty of fraud,

actual, although not necessarily intentional. It must, therefore, appear that the decision of the engineer was brought about by actual or constructive fraud, and the burden of proving this is always upon him who seeks to set aside the engineer's decision. No other nor different proof will suffice, and the courts can not review nor set aside the decision of the engineer for any other reason, nor because they, acting in his stead, would have come to a different conclusion. This doctrine is nowhere better expressed than in the decision of the circuit court of appeals in the case of *Ogden* v. *The United States* (60 Fed. Rep., 725, at p. 727), where the court say:

> In the absence of fraud or such gross error as would imply bad faith, his decision must be held as conclusive on the appellee. That a court acting on the testimony in the record might have decided differently from the referee in the matter of the appellant's claim does not warrant the setting aside of the decision of the engineer in charge of the work.

Such in effect is the ruling of this court in *Sweeney* v. *The United States* (109 U. S., 618); *Railroad Company* v. *March* (114 U. S., 549, 553); *Railroad Company* v. *Price* (138 U. S., 185), and of the Court of Claims in the case of *Kennedy* v. *The United States* (24 C. Cls. R., 139).

In the case of *Railroad Company* v. *March* (*supra*), the action was brought under a contract for grading a railroad which contained the provision that the final estimate of the work done, material furnished, and the amount due therefor, made by the engineer of the company, should be final and conclusive upon the parties. The trial court charged the jury that the final estimate of the engineer was conclusive, unless it appeared from the evidence that

he was guilty of fraud or intention of misconduct *or gross mistake*. This court declared this charge to be erroneous because the court did not inform the jury that the mistake must be *so* gross or of such a nature that it *necessarily implied bad faith* on the part of the engineer. And this decision is cited and followed by the United States circuit court of appeals in the recent case of *Elliott* v. *The Railroad Company* (74 Fed. Rep., 707, 711), and in *Railroad Company* v. *Price* (*supra*), this court quoted from *Railroad Company* v. *March* (*supra*), and declared that the incompetence or negligence of an engineer in such a situation would not meet the requirements of the suit to be relieved from the effects of his estimates, unless his mistakes were so gross as *necessarily to imply bad faith*. And in the recent case of *Gilmore* v. *Courtney* (158 Ill., 432, 437), it was held that where a party voluntarily enters into an agreement that a third person shall estimate the work done and pass upon its quality, with power to reject and condemn all materials which, *in his opinion*, did not conform to the contract, he can not evade or disregard it except for fraud clearly proven.

The court below admits the soundness of these doctrines and confesses that if the engineer in charge had allowed *any* additional time on account of freshets, etc., during the period of the last extension, such time would have been final and conclusive and could not have been extended by the court. The court below said (opinion, record, p. 46):

> As to what additional time would be just and reasonable he, as the engineer officer in charge, was to determine, not by the exercise of arbitrary power,

but by the exercise of a just and reasonable judgment, and any additional time thus allowed would have been final.

But the court below are of opinion that the engineer did not rest his refusal to extend upon *that* ground, and, being further of the opinion that it was not competent for him to base his refusal upon any *other* ground, they proceed to award to the appellees all of the profits which they would have made if they had completed the work under the contract. In other words, judgment is rendered against the United States not because the contract was improperly annulled, but because it was annulled for an improper reason. This, we submit, is a mixed error of law and of fact. On page 51. folio 75, of the record the engineer in charge of this work gives his reasons for refusing any further extension of time, as follows:

> First. The failure of said Gleason and Gosnell to either finish their work at the time called for by the last extension of said contracts, or to make proper provisions for carrying on the work.
>
> Second. The said contractors did not fulfill the conditions upon which their time had already been extended.[1]
>
> Third. That the leniency already shown said contractors in extending one of the contracts twice and the other three times have not brought forth such efforts on the part of the contractors as the circumstances required.
>
> Fourth. That previous performance held out no hope of better efforts on their part.
>
> Fifth. That the faults of said contractors deprive them of the right to demand further extensions.

[1] As to what these conditions were, see Finding IV, record pages 32–34.

And he further states that he exercised his judgment in the fullest degree upon the contractual stipulation relating to the extension of time, taking into consideration all of the facts of the case.

Now, let it be borne in mind that the contractual proviso, which guarantees, as the court below seem to think, this right of extension of time when prevented by the elements, also carefully couples with it the provision that the failure to complete must arise *solely* from that cause and must not be in any wise caused by any fault of the contractors. And whether this failure to complete was or was not wholly or in part caused by the fault of the contractors was, like all of these other questions, solely for the decision of the engineer in charge. This decision he made, as shown above. He says that he refused any further extension because the claimants did not carry out the conditions upon which the last extension was made and because the faults of the contractors deprived them of any right to further extensions of time. This is necessarily a decision that during the period of the last extension the contractors failed to complete, not wholly by reason of the elements but also by fault of their own. Having so decided, the contract, even in the construction placed upon it by the Court of Claims, gave him full power to annul the instrument, which he did. We submit that the establishment of this fact utterly destroys the narrow technicality which is the sole foundation of the judgment of the court below.

But we further submit that the engineer was not required to base his decision solely upon this or any other special ground, it being sufficient for him to act as he

deemed "just and reasonable" in the premises under all the conditions and circumstances of the case.

The theory upon which the court below proceed is that by the terms of the contract the engineer was made an arbitrator for the determination of this question between the claimants and the United States, and as such arbitrator he failed to exercise that degree of disinterestedness and attention to the claimants' rights and interests which he should have exercised as an impartial umpire between the two parties to the contract. We submit that there is nothing in this contract upon which any such notion can be properly founded. The contract does not create an arbitrator, in the legal sense of that term, out of the engineer in charge of this work, and invest him with the Poo-Bah functions which the learned court below have invested him with, but merely provides for the creation of a ministerial agent who is to determine whether or not, under all the facts and circumstances of the case, the claimants were prevented from completing the work by reason of any fault or neglect of their own, or whether such noncompletion within the time specified by the contract was solely caused by ice, freshets, or the force and violence of the elements; and if solely caused by the latter, whether or not, in his judgment, the facts of the case would warrant him in extending the time for the completion of the work, and if so, what amount of extension would, under all the circumstances of the case, be just and reasonable.

The court will observe, therefore, in the first place, that before the claimants can make any claim whatever for an extension of time the engineer in charge of the

work must be satisfied that the failure to complete the work within the time prescribed by the contract was not due to any fault on the part of the claimants, but, on the contrary, was wholly brought about by the force and violence of the elements. In the second place, even after being so satisfied, he is invested with a discretion to extend or not to extend the time, as he pleases. The contract does not say that the contractors under these circumstances *shall* be entitled to any additional time, but that "such additional time *may* be, in writing, allowed as in the judgment of the engineer shall be just and reasonable," thereby leaving the whole matter of extension entirely within the discretion of the engineer in charge of the work. If the engineer under these circumstances granted an extension to the claimants, or did so as a matter of grace and not because he was required to do it by anything contained in the contract, the right to extension of the time in case of prevention by the force and violence of the elements could not be demanded by the claimants as a matter of right, but could only be appealed for as a matter of grace, trusting to the sense of "justice and reasonableness" of the engineer in charge. In the third place, even if the engineer concluded to extend the time at all, there is nothing in the contract which requires him to extend for any definite period or without reservation or conditions, but, on the other hand, the contract merely authorized him to do so for such time as, in his judgment, will under all the facts of the case be just and reasonable.

To the engineer in charge, therefore, is left the sole and exclusive discretion with reference to this extension.

The contract provides that *he* may extend if in *his* judgment *he* deems it reasonable. It does not provide that the court may extend, if the court thinks it just and reasonable; and the measurement of this justice and reasonableness is, by the terms of the contract, expressly made the conscience of the engineer in charge; and now to attempt to delegate the decision of that question to any other person than the one named in the contract would be the making of a new contract and not the enforcement of the one which the parties themselves made. The making of new contracts under the guise of interpretation is the exercise of contractual and not judicial functions. Courts can not make new contracts for parties, and their functions are solely to enforce the ones which the parties did make. Under the contract which the parties entered into in this case, the engineer in question was vested with a ministerial discretion rendered absolutely necessary by reason of the exigencies attendant upon the prosecution of the work. In the exercise of this ministerial discretion, the engineer in charge of the work, after having extended the time for the completion of the work for such period as he deemed to be just and reasonable, and the claimants still not completing the work, he did not consider that any further extension of time should be granted to them, for the reason that their failure to complete within the period of extended time was not due to the force and violence of the elements, but to their own fault and neglect. His decision in this regard is and must be conclusive upon all parties. There is no question of arbitrament raised by this provision of the contract, and the engineer, in

making this determination, did not act as an arbitrator or as an umpire, but as a final and conclusive judge, in whom was vested the exercise of a ministerial discretion.

The decision of the engineer, under the provisions of this contract, is no more of an award by a referee than was the decision of the Secretary in the case of *Gordon* v. *The United States* (7th Wall., 188), which is cited by the court below to sustain the notion that this engineer acted as an arbitrator. In that case an act of Congress referred a claim against the United States to an officer of one of the executive departments to examine and adjust. This act of Congress was accepted and acted upon by the claimants. The officer to whom the claim was referred examined and adjusted the same and made a certain allowance to the claimants, which the claimants were willing to accept. The Congress subsequently passed an act repealing the one referring the claim to the officer and the claimants contended that the reference under the first act was one of arbitrament and award, and therefore that the Congress had not the power to repeal the provisions of the act; but this court held that the reference did not constitute a case of arbitrament and award, and that the act repealing the former act was valid, the court (at p. 194) saying:

> As respects the effect of the repealing statute of March 2, 1861, the whole argument urged on behalf of the appellants is founded on a false assumption. It is asserted that this is a case of arbitrament and award and was binding as such on the Government, and that the repeal of the resolution of Congress could not affect or invalidate rights

> vested by the award previously made under it. But the Secretary of War was not an arbitrator. An arbitrator is defined as a private extraordinary judge, chosen by the parties who have a matter in dispute, invested with power to decide the same. The Secretary of War acted ministerially. The resolution conferred no judicial power upon him. In order to clothe a person with the authority of an arbitrator, the parties must mutually agree to be bound by the decision of the person chosen to determine the matter in controversy.

We look in vain through this contract for any provision whereby the parties have agreed to be bound by the decision of the engineer in charge of the work concerning his action in granting or refusing an extension of time, and under the authority of the decision just quoted it is manifest that no case of arbitrament and award can be made out under this contract. The engineer in this case acted ministerially, just as the Secretary did in the Gordon Case, not determining the rights of the plaintiffs or the defendants as a judge or an arbitrator or umpire, but simply exercising a ministerial discretion vested in him by the terms of the contract.

As was said by this court in the case of *Kihlburg* v. *The United States* (97 U. S., p. 401):

> Indeed, it is not at all certain that the Government would have given its assent to any contract which did not confer upon one of its officers the authority in question.

The case of the *Crane Elevator Company* v. *Clark* (80 Fed. Rep., 705), cited and relied upon by the court below, is misapplied, and is not an authority for the application

which has been made of it by the Court of Claims. That case was an action of assumpsit brought by the plaintiff in error to recover an unpaid balance of the contract price for furnishing and constructing a certain building with certain passenger elevators. The declaration contained a special count setting forth the contract with the plaintiff in error, which contained the following provision:

> One-half of the contract price shall be paid when the cylinders are in permanent position; the balance when the plant is running to the satisfaction of the architect and has been accepted by him.

The special count alleged performance of the contract and that the elevators and each of them were accepted by the architect. The declaration contained a special count upon an independent agreement touching which there was no controversy, and it also contained the common counts. The plea was the general issue. At the trial the plaintiff gave evidence tending to prove: The performance by it of the work specified in the contract; that the plant was tested to determine whether the contract had been performed with reference to speed and load. This test was prearranged, the defendant and the owner of the building being present. The architect was notified of the test to be made and was requested to be present, or to be represented, at such test, and promised to be represented and was represented by his assistant, who, after the conclusion of the test then and there expressed his satisfaction, stating that the test as to capacity and the speed of the elevators fulfilled every condition of the contract, and that he was perfectly satisfied with

it. That upon application to the architect for a certificate, he, the architect, made no specific objection, but stated certain objections that had been urged by the owner of the building. The defendant gave evidence tending to prove that in certain respects the contract had not been performed. The architect testified that the elevators were not completed to his satisfaction and had not been accepted by him; that he declined to give a certificate "until the work was completed according to contract;" that he thought he gave some reasons, "as I usually do," but could not recall the reasons, if any, that he gave. He did not at the trial give any particulars wherein the work was defective or incomplete. He stated that before the test he had observed the elevators did not start and stop properly, and were too noisy; that he was not an expert with respect to elevators, and he does not state whether the failure to start and stop properly was owing to a defect in workmanship or in operation; that noise is incidental to the operation of all elevators; that he received from the owner a letter which states that he is informed that he, the architect, contemplated acceptance of the elevator plant and states certain objections, closing as follows:

> I do most positively protest against the acceptance of the elevators in my name, or in my behalf, and forbid you to do so.

A copy of this letter the architect sent upon the following day to the plaintiff in error, without comment. There was no evidence of any report made by the architect's assistant to him, nor was the said assistant called

as a witness. There was also evidence tending to prove that after the test the owner took possession of the elevators and contracted for their operation, and evidence was given to the effect that the objectionable noise arose from the operation of an electric pump, placed at the request of the owner and contrary to the advice of the plaintiff in error. At the conclusion of the testimony and upon motion of the defendant, the court directed a verdict for the plaintiff in error for the amounts which were undisputed, and refused to submit to the jury the right of the plaintiff to recover the unpaid balance upon the contract, the court being of opinion that no recovery could be had upon this item, unless, except and until the architect's certificate had been obtained that the work had been completed to his satisfaction—holding that under the contract such certificate was a necessary prerequisite to the institution of the suit and that recovery of the unpaid balance could not be had upon the common counts. This ruling of the court below was reversed by the circuit court of appeals, which held that the plaintiff in error had a right, under the pleadings, to recover the unpaid purchase money under the common counts, in case he were able to satisfactorily prove that there had been a substantial compliance on his part with the contract and that he had been unable to obtain the architect's certificate, because that person had arbitrarily refused to give it and that the plaintiff in error was entitled to have this question submitted to the jury for determination. The court was of opinion that the plaintiff in error was entitled to the independent and honest judgment of the

umpire with reference to whether or not the contractors had fulfilled the conditions of the contract and that the architect could not, merely relying upon objections to the elevators made by the owner of the building, refuse to give such certificate and refuse to exercise his judgment in the premises one way or the other; that the architect under this contract was made an arbitrator between the parties upon this point, and that his willful and arbitrary refusal to act or to exercise his judgment constituted a fraud in law, availing to dispense with the necessity for his judgment as a condition precedent to the right of recovery by the contractor for the work done.

It will be readily seen, therefore, how utterly different are the essential elements of this case from the case at bar. Here there is drawn in question no matter of arbitrament nor the exercise of quasi judicial functions, but merely the exercise of a ministerial discretion. Here there has been no arbitrary refusal to accept an executed contract, but merely a refusal to extend the time for the completion of an executory one. Here there has been no passive acquiescence in the owner's objections and the refusal to exercise the judicial judgment with which the arbitrator was charged by the contract, but, on the contrary, a full and complete exercise by the engineer of the discretion vested in him and the doing of what to him seemed just and reasonable under all the circumstances of the case. Here there is no question of the right to recovery under the pleadings without first obtaining the architect's certificate, and here there is no question of awarding the balance due under a contract, which has been honestly and in good faith performed by the plaintiff,

certainly in substantial compliance with the contract, if not literally, and to avoid which is interposed merely the technicality of the absence of an architect's certificate, but of awarding prospective profits to one who alleges that he could have completed if he had been given all the time that he wanted. We submit that there is no analogy whatever between the two cases and that the Crane Elevator Case is in no sense conclusive of the issues here involved.

IV.

The facts found are not sufficient to support the judgment rendered by the court below.

The findings of fact by the Court of Claims are a special verdict (*United States* v. *Smith*, 94 U. S., 214), and like every other special verdict they must contain of and in themselves, without the slightest reference to the testimony, or by any process of piecing together, every essential fact necessary for the resultant judgment. The special verdict is one by which the facts are found and the law is submitted to the judges. A special verdict, in order to sustain the judgment, must pass upon all the material issues made in the pleadings, so as to enable a court to say, upon the pleadings and verdict, without looking at the evidence, which party is entitled to a judgment. (2 Bouv. Law Dic., ed. of 1897, title "Verdict.")

In the case of *Ward* v. *Cochran* (150 U. S., 507, at p. 608) this court, through Mr. Justice Shiras, said:

> Where a special verdict is rendered all the facts essential to entitle a party to a judgment must be

found, and the judgment rendered on a special verdict failing to find all the essential facts is erroneous.

In the case of *Prentice* v. *Zane's, administrator* (8th How., 370, 483), it was said:

> In the *Chesapeake Insurance Company* v. *Starke* (6th Cranch., 268); and *Barnes* v. *Williams* (11th Wheat., 415), this court has decided that where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the court will not render a judgment upon such an imperfect special verdict, but will remand the case to the court below, with instructions to award a *venire de novo*.

In *Hodges* v. *Easton* (106 U. S., 408), where it was contended that an imperfect special verdict might be pieced out and the missing facts be supplied by reference to other parts of the record, the same conclusion was reached, and the court below was directed to award a new trial.

In the case of *Newbegin* v. *The National Bank* (27th U. S., App., 712), the court of appeals said:

> This case appears to have been tried by the circuit court upon a written stipulation of the parties waiving a jury, pursuant to sections 649 and 700 of the Revised Statutes. The circuit court made and filed a special finding of facts and ordered a judgment to be entered against the plaintiff. An inspection of the special finding of facts, as contained in the record, discloses to this court that the facts found are insufficient to sustain the judgment. The court first found the existence of certain facts which clearly entitled the plaintiff to a judgment, and thereafter found that the plaintiff's right of action was barred

on the ground of laches, but no facts were found by the circuit court which are sufficient to support the conclusion that the plaintiff's right of action was barred by laches. For these reasons the judgment of the circuit court is reversed and the case is remanded, with directions to award a new trial.

Looking now to the facts found in the special verdict of the court below, it will be readily seen how utterly insufficient they are to support the judgment which is predicated upon them.

The judgment of the court below is:

First. For the profits which the appellees would have made on the two works, if they had been able to complete the same.

Such a conclusion, in order to be sound, must be based upon the following facts:

(*a*) A determination of the *amount* of time that would have been a "just and reasonable" extension.

No limit is fixed by the court below. Would it have been "just and reasonable" to extend the time for six months, or a year, or two years, or for what time? We are not informed; and for aught that appears in the findings of the court below, these appellees had the right of indefinite extension, even if it took a lifetime.

(*b*) A finding that the appellees could and would have completed these works at the profits mentioned, within the time thus determined to be a "just and reasonable" extension.

There is no such finding. On the contrary, the evidence shows that the appellees have already taken *three times* as long to do these works as they originally contracted to do them in, but have only completed some 14

per cent thereof, although each season, down to 1888, was unusually favorable for this character of work (see Finding II, p. 31; Finding XIX, pp. 39 and 40); and we are also informed that the Government did not complete the works during the season of 1889 (Finding XXII, p. 41).

We are not informed whether the season of 1889 was a favorable or an unfavorable one, but we are told that the work was not completed. If the Government, with all of its facilities, capital, and trained forces, could not complete this work in 1889, what right had the court below to assume that the contractors could complete it in that year? Certainly there is nothing shown in their past performance that for a moment hints at such a notion. Or if the court did not assume that they would complete the work in 1889, then did the court assume that they would do it in 1890, or 1891, or 1892, or when? For the court certainly assumed that they would complete it some time or other, and must have assumed it, for they did not find it, and there was no evidence before them upon which they could have found it. The court below has not determined any of these questions, but has merely said that because the appellants refused to grant *any* time when they should have granted *some* time, therefore the appellees are to be awarded all the profits they could have made, as if they had completed the contract under the most favorable conditions at the time when the contract was annulled. It is respectfully submitted that this assumption falls little short of absurdity. The only damages that can be awarded against the United States are those which have been actually sustained by

the appellees. Punitive damages can never be awarded against the United States. Profits can only be awarded when they are proven. There are no facts found by the court below which show that the appellees would have made any given amount of profits, or that they would have made any profits at all, or that they would not have sustained a loss if they had completed the contract. The grounds upon which the general rule of excluding profits in estimating damages rests are—(1) That in the greater number of cases such expected profits are too dependent upon numerous uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote and not as a matter of course the direct and immediate result of the nonfulfillment of the contract; (3) and because most frequently the engagement to pay such loss of profits in case of default in the performance is not a part of the contract itself, nor can it be implied from its language and terms (Sedgwick on Damages (7th ed.), vol. 1, p. 108; *The Schooner Lively*, 1 Gallison, 315, 325, per Mr. Justice Story; *Anna Maria*, 2 Wheat., 327; *Parish* v. *The United States*, 100 U. S., 500, 507; *How.* v. *Stilwell Mfg. Co.*, 139 U. S., 199, 206), and in every case where profits have been allowed as a part of the damages for the breach of contract it has been not only where such profits were not open to the objection of uncertainty or remoteness, but also where, from the express or implied terms of the contract itself, it was fairly and fully shown that the loss of such profits as a measure of damages were within the intent and mutual understanding of both parties at the time the contract

was entered into. (*United States* v. *Beham*, 110 U. S., 338, 345, 346, 347; *Western Union Telegraph Company* v. *Hall*, 124 U. S., 444, 454, 456.)

Now, surely it can not be said from the express or implied covenants of this contract that it was within the mutual contemplation of the parties at the time the same was executed that the contractors should be paid all the possible profits on these jobs in case the engineer in charge refused to extend the time for the completion of the work on account of the conditions of the weather. The appellees are entitled to be and have been paid for all the work done, and are entitled to be paid for such expenditures as were actually and properly made in a bona fide preparation for the execution of these contractual undertakings, including a fair compensation for their personal services, but they are not entitled to anything more. (*Parish* v. *United States*, 100 U. S., 500, 507; *Bulkley* v. *United States*, 19 Wall., 37; *United States* v. *Smith*, 94 U. S., 214, 218.)

In *United States* v. *Smith* (*supra*), this court said:

> The United States can only be required to make compensation to the contractor for damages which he has actually sustained by their default in the execution of their undertakings to him; but this is the extent of their liability in the Court of Claims. More than compensation for damages actually sustained can never be awarded against the United States. * * * In the estimation of damages the Court of Claims occupies the position of a jury under like circumstances. Damages must be proven. The court is not permitted to guess any more than a jury, but, like a jury, it must make its estimates from the proofs submitted.

(*c*) To sustain a judgment for the profits awarded it is necessary to have found that in the future the same industrial and climatic conditions and the same relation of supply and demand would obtain as in the past.

No such finding is made, and manifestly could not have been made. The theory upon which the court below estimated the profits was that in the two most favorable years it had cost 50 cents per cubic yard to crush and deliver this cement rock, during which time, by reason of active street-paving operations in the city of Louisville, which created a large and constant demand for this character of rock, there was a ready market for said stone at the price of $1.25 per cubic yard, resulting in a net profit of 75 cents per cubic yard to the contractors. (Findings XIV, XV, and XVI, Record, p. 37.) And the court, without so finding, and without the slightest evidence upon which to so find, proceeds to assume that the weather will continue as favorable; that the cost of labor and material will remain the same; that Louisville will continue to pave her streets, and that the price of this rock will remain the same throughout the indefinite, undefined, and indefinable stretch of futurity that it awards to the appellees in which to tinker away upon this work. We submit that it is not permissible to mulct the Government in damages by any such Procrustean method as this.

(*d*) To support the judgment rendered, it is essential to have found whether or not the appellees sought for and obtained other employment for themselves, their plant and capital during the period following the rescission of this contract, and to have deducted whatever profits

were thus made from the amount of the judgment rendered.

This has not been done. For aught that appears in these findings, *non constat*, that the rescission of this contract did not result in a very material benefit, instead of a loss to the appellees. By the rescission of this contract their personal services, entire working plant, and capital were released from this undertaking, which otherwise would have consumed them all, and of course it thereupon became, and was, their duty to diligently seek other employment for themselves, their capital, and their plant. They could not sit idly by for an indefinite period and recover from the appellees the prospective profits on a broken contract, when they might have made a great deal more money out of another contract or other employment, if they had only tried to get it. If they diligently sought other work and failed to obtain it, of course the appellants are responsible; but if they succeeded, the profits which they made out of that work while released from the performance of this are to be deducted from the damages awarded, and if they equaled or exceeded the profits which they would have made on this work, then there has been no damage resulting to them from the rescission of this contract, and therefore, of course, there should have been no damages awarded to them by the court below. None of these essential facts are found in the special verdict of the court below, and it is therefore utterly insufficient upon which to rest the judgment so rendered.

The doctrine of avoidable consequences arises from the same principle which refuses to take into consideration any but the direct consequences of an illegal act, and is

applied to limit the damages where the plaintiff, by using reasonable precautions, could have avoided them. The principle is an exclusion of consequences which, inasmuch as the plaintiff can avoid them, do not damage him as a result of the defendant's wrong. They are excluded from recovery as remote. The doctrine rests upon the intervention of the plaintiff's will, as an independent cause; *ad hoc*, he is not damaged by the defendant's act but by his own negligence or indifference to consequences.

A very apt illustration of this principle as affecting the facts in the case at bar is to be found in the case of *Murrill* v. *Whiting* (32 Ala., 54). That case was an action for damages for the defendant's breach of contract under a charter party providing for two successive voyages, "one voyage to be from Mobile to Toulon, and the other from Mobile to an Atlantic port in France," and reserving to the owners of the vessel the right to send her, "after the termination of the first voyage, to any other port in Europe to load for any port in the United States, proceeding from such port to Mobile to commence the second voyage," and the further right, "in case France should engage in war, to annul the contract for the second voyage." On France becoming engaged in war before the termination of the first voyage, the owners of the ship had the option, it was held, to be exercised by them within a reasonable time and notice thereof to be given to the charterer, to annul the contract for the second voyage; but on their failure to exercise this optional right, they were bound to offer, within a reasonable time after the termination of the first voyage, to make the second voyage, unless discharged or

excused by the charterer from making that offer, and, failing to make that offer within such reasonable time, they can not hold the charterer liable, on his abandonment of the contract, for failing to furnish a cargo for the second voyage. It was also held that it was the duty of the master of the chartered vessel, on the failure or refusal of the charterer to furnish the cargo as agreed on, to avail himself of all ordinary means to obtain another cargo, and if he neglected to perform this duty the owners can not hold the charterer liable for the increased damages resulting from such neglect. And upon this latter point the court said:

> The recovery must have been confined to such loss and damages as are direct and immediate, and naturally flow from the breach of contract alleged and proved; in other words, the breach of the contract must be *the cause and not merely the occasion* of the losses or damages in order to entitle the plaintiffs to recover them. (*Moore* v. *Appleton*, 26 Ala., 633, and authorities there cited.) Full indemnity to the plaintiffs for such loss or damages is all that they are legally entitled to recover. If the party entitled to the benefit of the contract can protect himself from the loss arising from the breach at a reasonable expense, or with reasonable exertions, he fails in his social duty if he omit to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable. It is his duty to seek other employment. Idleness is in itself a breach of moral obligation. But if he continue idle for the purpose of charging another, he superadds a fraud which the law had rather punish than countenance. In the absence of special circumstances to the contrary, the

law makes it the duty of the master of such a ship as that of the plaintiffs, in case of the failure or refusal of the charterer to furnish the cargo as agreed upon, to avail himself of the ordinary means and of all proper opportunities to obtain another cargo. If he fail to perform that duty and thereby the damages are enhanced, the owners of the ship can not recover the increase of damages resulting from the voluntary neglect of duty on the part of the master. If by performing that duty the loss from the defendant's breach of the contract would have been mitigated, the failure to perform it deprives the plaintiffs of the right to recover any damages or loss which would have been avoided by its performance. (Citing *Shannon* v. *Comstock*, 21 Wend., 457, 461; *Heckscher* v. *McCrea*, 24 Wend., 304; *Bailey* v. *Damon*, 3d Gray, 92; Addison on Contracts, 1152.)

In further support of these doctrines see *Dillon* v. *Anderson* (43 N. Y., 231); *Hamilton* v. *McPherson* (28 id., 72); *Hodges* v. *Fries* (34 Fla., 63, 76); *Dobbins* v. *Duquid* (65 Ill., 464); *Miller* v. *Mariner's Church* (3 Greenleaf, 51, 55, 56).

In the last-cited case the court say:

> In general the delinquent party is holden to make good the loss occasioned by his delinquency, but his liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish and throw the entire loss upon the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time and if they bring

> less he may recover the difference, with commissions and other expenses of resale, from the purchaser. If the party entitled to the benefit of the contract can protect himself from the loss arising from the breach, at a reasonable expense or with reasonable exertions, he fails in his social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable.

Second. The second item which goes to make up the judgment of the court below is for the amounts of the retained percentages upon the work amounting on the one contract to $4,011.99, and upon the other to $2,401, making a total of $5,412.99. The theory upon which the Court of Claims rendered judgment for these retained percentages is, that under the contractual provisions these sums were retained by the defendants, not as liquidated damages to be held as a penalty for the noncompletion of the work, but merely as unliquidated damages to reimburse them for such actual loss as the Government might sustain by reason of the noncompletion of the work on the part of the appellees, and that, inasmuch as no special or actual damages to the Government was shown, the appellees were entitled to recover the amounts of these retained percentages. Such has been the uniform holding of the court below upon contractual provisions of this character, and there are decisions in this court which appear to uphold the doctrine. And if the court is of opinion that such is the true construction to be placed upon this contract, this portion of the judgment would be correct, but that should certainly be the extent of the judgment.

It is therefore submitted that, in any view of the case, the judgment of the court below is clearly erroneous, and that the same should be reversed, with instructions to dismiss the petition of the appellees, or to confine the judgment to the amount of the retained percentages, to wit, the sum of $5,412.99, and to dismiss the petition with reference to the remainder of the claim, or that the said judgment of the court below should be reversed, with instructions to award the appellants a new trial.

GEORGE HINES GORMAN,
Special Attorney for the United States.
L. A. PRADT,
Assistant Attorney-General.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 59.

THE UNITED STATES, APPELLANTS,

vs.

JOHN R. GLEASON AND GEORGE W. GOSNELL, APPELLEES.

APPEAL FROM THE COURT OF CLAIMS.

Brief of Argument on Behalf of the Appellees.

STATEMENT OF THE CASE.

This appeal is from a decision of the Court of Claims covering two suits in that court, Nos. 17782 and 17783, consolidated for convenience (Record, p. 30), and heard and decided as one case, in which judgment was entered for the appellees.

The suits were filed in the Court of Claims by the appellees for breaches by the United States of two contracts,

the first (suit No. 17782) entered into August 4, 1885, between Lieut. Col. William E. Merrill, corps of engineers, United States Army, for and on behalf of the United States, and the appellees, as partners, for the excavation of 110,000 cubic yards, more or less, of rock in the improvement of the head of the Louisville and Portland canal at Louisville, Kentucky, which excavation is known herein as the Upper work.

The second contract (suit No. 17783) was entered into January 13, 1887, between Major Amos Stickney, corps of engineers, United States Army, for and on behalf of the United States, and the appellees, as partners, for the excavation of 124,000 cubic yards of earth and 13,000 cubic yards of rock, more or less, for enlarging the basin near the lower end of the same canal, which excavation is known herein as the Lower work.

In the suit arising upon the contract for the Upper work the Court of Claims made upon the evidence findings of fact I to XVII (Rec., pp. 30–38), and the conclusion and judgment that the appellees were entitled to recover the retained percentage of $3,011.99 and the net profits which they would have made on the contract, amounting to $60,537.50 (Rec., p. 42).

In the suit arising upon the contract for the Lower work the Court of Claims made upon the evidence findings of fact XVIII to XXV (Rec., pp. 38–42), and the conclusion and judgment that the appellees were entitled to recover the retained percentage of $2,401, and for the net profits which they would have made on the contract the further sum of $2,827.50 (Rec., p. 42).

In both cases the aggregate judgment in favor of the appellees against the appellants was for the recovery of $68,777.99 (Rec., p. 42).

After this judgment had been rendered the defendants below made motions in the Court of Claims for a new trial and for an amendment of the findings of fact (Rec., pp.

51–54). The motion for a new trial was overruled and the motion for amendment was granted in part (Rec., p. 54).

Thereupon the defendants below filed this appeal upon the merits, and also an appeal from the denial of the Court of Claims of the motion for a new trial (Rec., pp. 54, 55). The record presents the findings of fact as amended.

UPPER WORK.

The findings of fact show the following:

On August 5, 1885, the contract, with specifications as set out in full in the petition (Rec., pp. 10–15), was entered into between Lieutenant Colonel Merrill in behalf of the United States and the appellees, for the excavation of 110,000 cubic yards, more or less, of rock in the enlargement of the Louisville and Portland canal, to be completed on or before December 31, 1886 (Finding I, Rec., p. 30).

The compensation of the contractors was to be twofold, 85 cents per yard in cash (hereinafter shown to have been in itself less than the cost of excavation) (Finding XIII, Rec., p. 37) and possession of and property in the material excavated (Findings I, p. 30, and XIV, p. 37).

The rock to be excavated was in the river bed, in an exposed situation, and was exposed to great force of the river when the latter rose to stages above the top of the Government cross-dam, which was 5 feet high by the canal gauge (Finding V, p. 34).

Before the contract was entered into the engineer in charge prepared specifications for the information of bidders, which were exhibited to the claimants, and on the faith of which they entered into the contract. These specifications contained the provision that the contractor "must begin work within 20 days after notification that his bid has been accepted, unless hindered by high water." The claimants were advised by the ninth specification so exhibited that their contract would provide "that additional

time may be allowed to a contractor for beginning or completing his work in cases of delay from freshets, ice, or other force or violence of the elements and by no fault of his or their own" (Finding VI, p. 34).

In pursuance of these specifications, so exhibited by the engineer officer of the appellants, and amounting, as the appellees contend, to promises of protection against loss by freshets (much to be apprehended on account of the situation of the work in the river bed), and inducements to enter into the contract, the appellees undertook the excavation.

In performance of the promise held out by said specifications the contract, among other things, contained the following provision:

"If the parties of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable" (Finding I, p. 30).

The season from August, 1885, to December 31, 1886, was favorable in the main for the character of work provided for in the contract, though the claimants were compelled by reason of high water and freshets to suspend their operations a number of times, and by reason of these difficulties, coupled with an insufficient force of men and other means necessary for the performance of the work, they only "completed 14 per cent. of their entire work" during the contract period (Finding II, p. 31).

In consequence of the claimants' inability to complete the work within the contract period, as aforesaid, they requested an extension of their contract to December 31, 1887, which was granted on conditions stated in a supplemental contract (Finding III, p. 31). Not only was this extension

granted, but thereafter, on January 13, 1887, the contract for the Lower work was entered into by the appellants with the appellees (Finding XVIII, p. 38).

The claimants, not having completed their contract for the Upper work during the year's extension thereof, as aforesaid, they, on December 31, 1887, requested a second extension of said contract to December 31, 1888, for the reasons set forth in their communication of that date (Finding IV, p. 32).

The extension of the time of said contract to December 31, 1888, as requested and recommended, was granted and approved by the Chief of Engineers "on condition that the provisions in their application be faithfully carried out," of which approval the claimants were notified (Finding IV, p. 34).

These various extensions were granted by the officers of the appellants as well for the benefit of appellants as for the benefit of the contractors. The letter of Major Stickney, the appellants' officer in charge, dated December 31, 1897, states: "The interests of the Government will be best served by an extension of time" (Finding IV, p. 33). Nowhere does it appear that any extension granted was granted by the officer of the appellants as a matter of grace to the contractors.

It may be here stated that the appellees' contention is that by these extensions either new contracts (with the same details and provisions except as to time) were entered into between the parties, and that the officer of the appellants could not assign as a breach of the latest or subsisting contract, or as a reason for its annulment, or as an excuse for not performing his own part any act, omission, or fault of the claimants (if any such there were) which occurred prior to the last extension, and to entering into such subsisting contract, or if the contract be considered as single and continuous, each extension of it by the appellants for their own benefit operated to waive and condone any fault, if such

there were, of the claimants occurring prior to such extension.

Up to the end of the year 1887 the appellees performed rock excavation according to the contract amounting to 35,435.22 cubic yards (Finding XII, p. 37), for which they were paid the contract price of 85 cents per yard, less 10 per centum reserved by the appellants, amounting to $3,011.99, which latter sum has never been paid by the appellants to the appellees (Finding XI, p. 37).

During the period of the last extension, the year 1888, the appellees were able to perform comparatively little work. This arose from no fault of their own, as found by the Court of Claims (Finding VIII, p. 36), but from the unprecedented condition of the Ohio river (Findings VII, p. 34, and XVII, p. 38), in the bed of which the work lay exposed to the force of the waters when the river was at a high stage (Finding V, p. 34). This fully appears from the official reports of the appellants' officers (Finding VII, pp. 34–36). These reports show that high water prevented any work from and including December, 1887, up to some time in June, 1888. In June a dam was constructed and drilling and blasting performed on high points of the rock (report for June, Rec., p. 35), confirming Finding VIII (p. 36), of the diligence of the contractors during this season. In July this work on high points of the rock was continued, the water pumped out of the excavation pit, and the tracks for carrying away the rock put in order; but on July 11 the contractors were run out by high water (report for July, Rec., p. 35), and did not resume during that month.

In August excavation was continued until the 18th, on which date the work was flooded by high water (report for August, Rec., p. 35).

In September no work was done, "since the contractors were run out by high water" (report for September, Rec., p. 35).

In October a temporary earth dam was begun on the 5th.

The pump was started on the 9th. On the 11th the river washed away the dam (report for October, Rec., p. 36).

The river remained over the contractors' section from October 11 till the end of November (report for November, Rec., p. 36).

In December no work was done (report for December, Rec., p. 36).

There is no contention but that high water prevented any work in December. The report does not state the reason. But the report for October did not state the reason for no work being done after the 11th; yet it appears from the November report that "the river has been over their section since that date," viz., October 11.

It is to be noted that these current reports, made at the time and before this controversy arose, contain no suggestion of fault or want of diligence in the contractors, but recognize the impracticability of performing the work when the river was at the high stages mentioned by the reports.

Accordingly the court below upon all the evidence, including these official reports of the appellants' engineer officer in charge of the work, finds as facts:

"The condition of the Ohio river was during the season of "1888, the period of the last extension, unusual and unprece- "dented for repeated and continued freshets and high water, "overflowing the cross-dam aforesaid; in consequence of "which freshets and high water the working season of 1888, in "the Ohio river at Louisville, Ky., was limited to about thirty- "five days, mostly in July and August" (Finding VII, p. 34); that "during the working season of 1888 the claimants "were diligent in the prosecution of work embraced in the "contract, in preparing therefor, and endeavoring to ex- "clude the water and freshets of the river. They provided "for the additional plant mentioned in their application "for extension and had it ready for operation at the begin- "ning of the season of 1888. But there was insufficient

"working time to complete the work by December 31, "1888, at the rate of 640 cubic yards for each prac- "ticable working of twenty-four hours, and this from "no fault of the claimants during the last extension "of their said contract. No act or omission of the "claimants during the period of the last extension made "it impossible to complete the work by December 31, 1888" (Finding VIII, p. 36); that "from the foregoing official "reports, as well as from the other facts found herein, the "court finds the ultimate fact that the condition of the river "was as herein set forth; and the time remaining for active "work, after deducting the time when it was impossible to do "work by reason of the high water and freshets, was insuf- "ficient for the completion of the work under the contract "within the period of extension, and that it was impossible "for the complainants to complete the work within the "working time thus remaining" (Finding XVII, p. 38).

Interpreted in any reasonable way, these official reports of the appellants by themselves fully confirm the finding of the court below as to the condition of the river, to say nothing of the other evidence which was before the court on this point, referred to generally in Finding XVII.

The contention of the appellees upon these facts is that the contingency provided against in the contract arose, and that they were "by freshets, ice, or other force or violence "of the elements and by no fault of their own prevented "from completing the work," and that they were entitled as a matter of right, if the provision of the contract means anything and is to be given any contractual effect, to an extension of their time for performing the work.

The last extension of the contract to December 31, 1888, having thus expired without the completion of the work, the appellees applied for a further extension, under that clause of the contract which provided for an extension in case of freshets and force and violence of the elements, which was refused (Finding X, p. 36).

Upon the evidence below on this point the Court of Claims found that "the defendants nor the engineer officer in charge "on their behalf did not annul or terminate the contract as "therein provided for by reason of any delay or for any "want of faithfulness or diligence on the part of claimants "in the prosecution of the work thereunder during the "period of the last extension of said contract, but based his "refusal to further extend the contract because, as he as-"serted, the claimants had for a number of seasons failed to "complete the work within the time agreed upon.

"No judgment or decision was given by said engineer on "the question as to whether the claimants were prevented "by freshets and force and violence of the elements during "the season of 1888 from completing the work agreed upon "within the period limited by the last extension of the con-"tract, nor did he find or decide that the claimants were "not so prevented" (Finding X, p. 36).

The contention of the appellees upon these facts is that they show the action of the engineer officer of the appellants to have been arbitrary, unreasonable, and unjust, involving such refusal to do what the contract required or such gross mistake as necessarily implies a failure to exercise an honest judgment.

The contract provided for its annulment by the appellants in case of any want of faithfulness or diligence on the part of the contractors (Finding I, p. 31). No annulment or termination of this contract for this cause was ever made by the appellants nor their officer (Finding X, p. 37).

The appellees submit that the facts found by the court below, and above recited, show a breach of the contract by the appellants, resulting in a loss to the appellees of the profits which they would have made by a completion of the contract, which should be made good to them, as far as possible, by an award of damages.

As to the result to the appellees of completing the work, the court below found that there remained to be excavated

83,500 cubic yards of rock (Finding XII, p. 37); that the excavation of the same would have cost the appellees $33,400 in excess of the contract price (Finding XIII, p. 37), but that the excavated rock was under the contract the property of the contractors and a part of the consideration (Finding XIV, p. 37); that the remaining rock would have produced 125,250 cubic yards of broken stone, for which there was a ready market, and of a net value to the contractors of $93,937.50 over the cost of crushing and delivering (Findings XIV–XVI, pp. 37, 38).

The profit to the contractors in performing the remaining work would have been $93,937.50, less the loss on excavation of $33,400, or $60,537.50 net profit (Finding XVI, p. 37).

The other item of damage is 10 per centum of the money earned on completed excavation, which 10 per centum has been retained by the appellants and amounts to $3,011.99 (Finding XI, p. 37).

The total damage to the appellees under this contract for the Upper work, as found by the Court of Claims, is $63,549.49 (Conclusion, Rec., p. 42).

LOWER WORK.

As the points of law hereinafter referred to are substantially the same in both cases, the statement of the case relating to the Lower work will here be made.

The findings of fact of the Court of Claims show that on January 13, 1887, the contract with specifications, as set out in full in the petition (Rec., pp. 23–29), was entered into between Major Amos Stickney, in behalf of the United States and the appellees, for the excavation of 124,000 cubic yards of earth and 13,000 cubic yards of solid rock, more or less, for enlarging the basin of the Louisville and Portland canal at the head of the locks, at the rate of 17½ cents per cubic yard for the earth and $1.05 per cubic yard for rock excavation, the work to be completed by December 31, 1887.

The contract contained the same clause as to extension of time in case of freshets and force and violence of the elements already referred to above in the case of the contract for the Upper work (Finding XVIII, Rec., p. 38).

The claimants entered upon the performance of this contract, and on December 28, 1887, not having completed the same, requested an extension of time until June 1, 1888 (Finding XIX, Rec., p. 39).

This extension was granted upon the ground that "nothing would be gained by a denial of this request."

A further request for extension, because of loss of time from high water and other causes, to August 31, 1888, was granted upon the recommendation of the officer of the appellees, saying, "It is believed the interests of the Govern-"ment will be best served by granting the extension."

A final extension to December 1, 1888, was requested on account of high water on two occasions since June 1, 1888, and was granted (Finding XIX, Rec., pp. 39–41).

These several short extensions were granted for the benefit of the appellants (see the recommendations of the engineer officer quoted in Finding XIX, p. 40), and there is nothing to suggest that they were granted as a matter of grace or indulgence to the appellees.

As in the case of the contract for the Upper work, the appellees contend that a new contract was entered into by the last extension to December 1, 1888, and in any event that all previous causes of forfeiture or annulment, if any existed, were waived and ceased to be of any further force or effect for either party.

Considering the conditions as existing during the last extension, the Court of Claims found that:

"The condition of the Ohio river during the season of "1888 was unusual and unprecedented for repeated and "continued freshets and high water, in consequence of "which the claimants were, during the period of the last "extension of their contract, by freshets or force and vio-

" lence of the elements and by no fault of their own, pre-
" vented from completing the work at the time agreed upon
" in the contract as extended " (Finding 20, p. 41).

At the time the appellees were thus compelled to cease work they had completed according to the contract the excavation of 120,052 cubic yards of earth (97 per cent. of the whole and not 14 per cent., as stated in Appellees' Brief, pp. 39, 40) and 3,575 cubic yards of solid rock (Findings XXIV, p. 41, and XXV, p. 42).

In this condition of affairs the appellees invoked the provisions of the contract relating to freshets, and applied for an allowance of additional time. The Court of Claims find the circumstances of this application and its result to be as follows:

" At or near the end of the year 1888 the claimants,
" through the personal solicitation of their attorneys, Bodley
" and Simrall, applied to the engineer in charge for an allow-
" ance of additional time for the completion of the work
" agreed upon in the contract, for the reason that they had,
" by reason of freshets and force and violence of the elements,
" and by no fault of their own, been prevented from complet-
" ing the work at the time agreed upon in the contract as
" extended; whereupon the engineer in charge refused to
" allow such additional time.

" The defendants nor the engineer officer in charge on
" their behalf did not annul or terminate the contract as
" therein provided for by reason of any delay or for any
" want of faithfulness or diligence on the part of claimants
" in the prosecution of the work thereunder during the
" period of the last extension of said contract, but based his
" refusal to further extend the contract because, as he as-
" serted, the claimants had for a number of seasons failed to
" complete the work within the times agreed upon.

" No judgment or decision was given by said engineer on
" the question as to whether the claimants were prevented
" by freshets and force and violence of the elements during

"the season of 1888 from completing the work agreed upon "within the period limited by the last extension of the con- "tract, nor did he find or decide that the claimants were "not so prevented" (Finding XXI, p. 41).

The contention of the appellees upon these facts is that they were prevented from completing the work contracted for by freshets and by no fault of their own; were therefore entitled to an extension of time, and that the refusal of the same by the appellants, through their officer, was a breach of the contract for which the appellees are to be indemnified as far as possible.

The items of damage proved and found by the court below are two: First, the 10 per centum of money earned on completed excavation which has been retained by the appellants. This amounts to $2,401 (Finding XXIII, p. 41). Second, the immediate profits which the appellees would have made in completing the remainder of the work. This is found to be 30 cents per yard on 9,425 remaining yards of rock, amounting to $2,827.50 (Findings XXIV and XXV, pp. 41, 42).

The total damage to the appellees under this contract for the Lower work is found by the Court of Claims to be as above, amounting to $5,228.50 (Conclusion, Rec., p. 42).

ARGUMENT.

Assuming the conclusiveness of the findings of the Court of Claims as to matters of fact—

United States *vs.* New York Indians, decided March 30, 1899;

Stone *vs.* United States, 164 U. S., 380;

Desmore *vs.* United States, 93 U. S., 605;

Talbert *vs.* United States, 155 U. S., 45;

McClure *vs.* United States, 116 U. S., 145—

it remains to consider the questions of fact as presented by the findings and those of law which arise thereon.

I.

CONSTRUCTION OF THE CONTRACTS.

The making of the contracts for the Upper and Lower works between the appellants and appellees and the provisions of the contracts in detail are established by Findings I (Rec., p. 30) and XVIII (p. 38), which refer to the petitions for the terms of the contracts in full (Rec., pp. 10 and 23).

The first question which arises on each contract is in respect of the construction of the provision for allowing additional time if the contractors shall, by freshets, etc., and by no fault of their own, be prevented from commencing or completing the work at the time agreed upon.

The contention of the appellees is that this clause is a vital part of the contract, under which they are entitled as a matter of right to additional time if any of the contingencies provided against arise. The court below found that freshets supervened and prevented the completion of the works without fault of the appellees (Findings VII, VIII, XVII, XX, Rec., pp. 34–41), and the appellees claimed their

rights under said clause of the contracts, but were denied (Findings X, XXI, pp. 36 and 41). The question is thus squarely presented whether said clause is a material part of the contracts and is to be given any contractual effect or is merely superfluous, leaving the contracts to be construed exactly the same with the clause in them as they would be if it were absent.

INTERPRETATION OF THE WORD "MAY."

In the provision relating to the allowance of additional time, in case the contractors are prevented from commencing or completing the work at the times stated by freshets or other force and violence of the elements, and by no fault of their own, the word "may" should be interpreted to mean the same as "shall."

The principal rules governing the construction of contracts and applicable to the written agreements involved in this appeal all unite in requiring that the word "may" in the provision for additional time in case of freshets, etc., be construed to mean the same as "shall." Such rules are these:

1. "The interpretation of a contract should be favorable and liberal" (Story on Contracts, sec. 640).

2. Effect must be given, if possible, to every part and word (Shep. Touch., 87; Story on Contracts, sec. 640, 658*a*; Washburn *vs.* Gould, 3 Story R., 162).

3. All parts are to be taken together to ascertain and give legal effect to the true intention of the parties, without merely weighing the precise effect of single words (Washburn *vs.* Gould, *supra*).

4. And, as a last resort, doubtful words are to be taken most strongly against the speaker or person engaging him-

self by them (Story on Contracts, sec. 662; 2 Kent Com., 556; 1 Powell on Contracts, 395).

It is a favorable and liberal and no more than reasonable construction to give the contracts to hold that by the provisions under discussion the contractors *shall* be excused for non-performance without fault of their own if such failure is caused by freshets, etc. Such interpretation works not the slightest injustice to the other party and fulfills the first rule of construction above.

It is at once evident that to interpret "may" in its strict literal sense, as merely permissive, leaves the contracts of just the same effect *with* the word and its context as they would be *without* them. This does unnecessary violence to the contracts in obliterating a considerable portion of them—over ninety words in each—and violates the second rule of construction mentioned above.

Interpreting by the context, the words "by no fault of his or their own" seem conclusive as to the contractual nature and effect of this provision for the allowance of additional time and the mandatory character of the word "may." If this word is merely permissive, the contractors have no more right and are in no better position if without fault than if in fault. The context certainly implies that by being without fault, which is for the benefit of the United States, the contractors become *entitled* to a reciprocal benefit.

Considering the whole instrument "by the four corners," it appears that the work was excavation in a river bed peculiarly exposed to freshets, ice, and the force and violence of the elements; that to excuse the contractors for non-performance, even if prevented by the act of God, a special provision would be necessary (opinion below and authorities cited, Rec., p. 46); that the advertisement to bidders for the contract of August 4, 1885 (which is in terms made a part of the contract, Rec., p. 10), contains a clause which would appear to the layman to be a reasonable and effectual protection against such unlimited responsibility

(Rec., p. 12, par. 9), and that, finally, the promised provision *was* included in the contract, nearly one hundred words of the instrument being devoted to the purpose. The conclusion is irresistible that it was the intention of the contractors to be contractually, as a matter of right, protected by this provision, and that it was equally the intention of the officers then acting on behalf of the appellants to grant the contractors additional time if they should be prevented from performance by the act of God. Thus interpreting the word "may" by the context and by the whole instrument, the third rule above mentioned is followed and an intelligent and reasonable meaning is reached.

The contracts are in the usual form, printed *by the Government* for public works (Rec., p. 12, paragraph 9). Besides being the writers of both instruments in their entirety in the clause in question, the appellees were the speakers, making an engagement to the other parties (of the second part). Under the fourth rule above, "may" should be construed rather against the first party and in favor of the contractors to give a contractual right to additional time if prevented by freshets.

A special rule of construction is applicable to the contract of August 4, 1885 (which was preceded by the promise of protection in the 9th paragraph of the advertisement noted above, Rec., p. 12). This rule is well stated in Story on Contracts, sec. 664, as follows:

"If the inducement or proposition upon which a contract "is founded be ambiguously stated by one party, so as to "operate as a surprise upon the other party, such statement "will be construed in favor of the party deceived, although "the deception be unintentional. For in such case, the "party affording a ground of mistake should bear the re-"sponsibility."

In the great majority of instances where the meaning of the word "may" has been adjudicated it has been held to be mandatory and to be the same as "shall." It is suffi-

cient to refer to the leading cases of The King *vs.* The Inhabitants of Derby (Skinner, 370) and The King and Queen *vs.* Barlow (2 Salkeld, 609), both approved and followed by this court in Supervisors *vs.* United States (4 Wall., 435). The necessity for interpreting this word often arises in the case of statutes. An important reason for holding it to be the same as "shall" is that it ordinarily occurs in such a connection as "the sheriff *may* take bail," relating to the doing of some act by a *public officer*, who, it is presumed, will do what is right and just; so that the legislature, knowing that the officer will do this, is assumed (in judicially interpreting the word) not to have been particular and exact in its language, and the intent of the word is given effect regardless of the fact that it is actually permissive.

This reason applies to the case at bar. A sworn public officer, such as the United States Army engineer in charge of public work, has a status beyond that of a private citizen, and in making the contracts between the appellants and appellees it was assumed that such an officer would be a perfectly safe repository of so important a power as that of allowing the contractors additional time for the commencement or completion of the works contracted for in case of prevention by freshets, etc., and would do right and justice, and that the particular language used in such a provision of the contract was unimportant.

This court, through Mr. Justice Swayne, has expressed the principle in the following language:

"The conclusion to be deduced from the authorities is, "that where power is given to *public officers*, in the language "of the act before us, or in equivalent language—whenever "the public interest or *individual rights* call for its exercise— "the language used, though permissive in form, is in fact "peremptory. What they are empowered to do for a third "person the law requires *shall* be done. The power is given, "*not for their benefit but for his.* It is placed with the de-

"pository to meet the demands of right, and to prevent a "failure of justice. It is given as a remedy to those entitled "to invoke its aid, and who would otherwise be remedi- "less."

Supervisors *vs.* United States, 4 Wall., 435. (Italics our own.)

While the above language was used in construing a statute, the same principles of exposition apply both to statutes and contracts.

Smith on Contracts, 6th ed., 483, 501.

To slightly paraphrase an ancient statement of the common law relative to the King's grant, "it is for the benefit "of these citizens and for the honor of the Government, "which is rather to be regarded than its profit" (Com. Dig. Grant, G. 12; 9 Co. R., 131), that these contracts should be interpreted, in respect of the word "may," as the appellees contend.

It has heretofore been argued on behalf of the appellants that in case of freshets, etc., an extension of time could only be appealed for as a matter of "grace," trusting to the "sense of justice" of the engineer in charge, and that an extension depends upon the "conscience" of that officer. The appellees submit that to thus construe the contracts makes them unconscionable, destroys their essential mutuality, and constitutes the clause as to extension in case of freshets (both in the advertisements to bidders and in the contracts) as a mere trap to induce parties to enter into the contracts, but from which they can derive no contractual right. A contract will not be construed so as to be unconscionable against the United States (Hume *vs.* U. S., 132 U. S., 406), and contracts being construed according to the same principles, whether for or against the United States (U. S. *vs.* Smoot, 15 Wall., 36), they will not be made unconscionable by construction in favor of the latter.

It seems entirely hypothetical and inconclusive to argue, as do the counsel for appellants (page 18 of their brief), that "no contract whatever would have been made with these claimants" unless the engineer officer had retained power to hold the contractors to full performance notwithstanding prevention by act of God. As a sober proposition this seems extraordinary, but its force is entirely offset by the opposite argument that the contractors would never have entered into a contract for the unlimited performance of such an exposed work irrespective of prevention by the act of God. If these arguments have any force in throwing light on the contract, that of appellees is the more forcible, for the contract, according to the appellees' understanding, is reasonable and usual, while according to that contended for by counsel for appellants it is unusual (considering the exposed nature of the work), unreasonable, and improbable.

The case of Kihlburg *vs.* The United States (Appellants' Brief, p. 18) by no means holds, positively or inferentially, that the officer of the United States *must* have unlimited discretionary power over contractors, but only decides that "*the* authority in question," to decide as to distance and quantity, was proper and usual, and that "it is not at all certain that the Government would have given its assent to any contract which did not confer upon one of its officers" *such* an authority. This is far from being parallel to a construction of a contract which shall give the officer *unlimited discretionary power to require performance, notwithstanding the act of God.*

II.

The Powers of the United States Engineer Officer under the Contracts.

These distinctly appear from an inspection of the contracts (Rec., pp. 10–15 and 23–29).

1. His decision as to quality and quantity shall be final (Rec., pp. 10, 24).

2. He shall have power, with the sanction of the Chief of Engineers, to annul the contracts by a notice in writing, for want of diligence in the contractors or failure to perform in accordance with the specifications (Rec., pp. 10, 12; pars. 7, 8, p. 24).

3. In case of prevention by freshets, etc., he shall judge what additional time is just and reasonable (Rec., pp. 11, 24).

4. Shall direct the work in certain respects (Rec., p. 12, par. 2; p. 26, pars. 3, 8; p. 27, pars. 13, 18; p. 28, par. 24).

The above four special powers are all that the engineer possessed under these contracts beyond what the contractors had.

The first and fourth powers above mentioned were duly exercised as the work proceeded and have not come in question. The second power (to annul) was never exercised (Finding X, Rec., p. 36; Finding XXI, p. 41).

Occasion arose for the exercise of the third power under both contracts, namely, the actual occurrence of the freshets and force and violence of the elements provided against, without fault of the appellees (Finding VII, Rec., p. 34; VIII, p. 36; XVII, p. 38; XX, p. 41). This is virtually admitted in Appellants' Brief, page 4.

But the power was not exercised, no judgment as to what additional time was just and reasonable was rendered by the engineer, and any extension whatever was refused (Finding X, p. 36; XXI, p. 41).

Counsel for appellants seem, we think, to misapprehend the position contended for by us and upheld by the lower court. On page 28 they say:

"The theory upon which the court below proceed is that by the terms of the contract the engineer was made an arbiter for the determination of this question between the claimants and the United States, and as such arbiter he failed to exercise *that degree* of disinterestedness and attention to the claimants' rights and interests which he should have exercised as an impartial umpire between the two parties to the contract."

Not so. Our contention goes far deeper, and is not merely that the engineer failed to exercise "that *degree* of disinterestedness," etc., but that he *utterly failed to exercise his judgment at all.* The findings (X, XXI) show that the engineer *failed* to exercise *any judgment* whatever upon the all-important question whether freshets, etc., and not any fault of the contractors prevented completion during the last extension. The brief continues (28):

"The contract does not create an arbiter, in the legal sense of that term, out of the engineer in charge of this work;" but follows this assertion with the statement that the contract "merely provides for the *creation of a ministerial agent,* who is to determine whether or not, under all the facts and circumstances of the case, the claimants were prevented from completing the work by reason of any fault or neglect or their own, or whether such non-completion within the time specified by the contract was solely caused by ice, freshets, or the force and violence of the elements." * * *

This is precisely what we contend for. It is immaterial to us whether the engineer be called an "arbiter," as we have claimed, or a "ministerial agent," as counsel for the

Government claim. If "the contract * * * provides for the creation of a ministerial agent," and further provides that he "is to determine whether or not, under all the facts, * * * the claimants *were prevented* from completing the work * * * by ice, freshets, or the force and violence of the elements," then we submit the contractors had a *right* to have him "judge" and "determine" whether they were thus prevented by the elements from completing the work, and it is his total failure to thus "judge" and "determine" upon this vital question of which we complain.

"In the second place," say counsel for appellants, "even after being so satisfied [that the failure to complete the work within the allotted time *was not* due to any fault on the part of the contractors, but *was* caused by the force and violence of the elements], he is invested with a discretion to extend or not extend the time, as he pleases. * * * The right to extension of the time, in case of prevention by the force and violence of the elements, could not be demanded by the claimants as a matter of right, but could only be appealed for as a matter of grace, trusting to the sense of 'justice and reasonableness' of the engineer in charge."

We deny this. If, as counsel here assume, the delay was caused by the "freshets" and not by fault of the contractors, we contend the contract means, and can only mean, that they shall have a reasonable extension of time, and the engineer is merely granted the discretionary power to judge and declare how long that time shall be.

If in a building contract it should be provided that "if the builder should be prevented by freezing weather from properly laying the foundation of a building, reasonable additional time may be allowed to him for that purpose," would any fair mind doubt that the real intention of the parties was that such freezing weather would *entitle* the builder to the additional time? It could mean nothing else, for without any such protective clause the property-

owner would, of course, have the right to grant such additional time to the builder. What meaning, then, can reasonably be given to the language that "if the builder should be prevented by freezing weather from properly laying the foundation of the building, reasonable additional time may be allowed him for the purpose," unless it means that in that event he *will* or *shall* have such additional time? And then suppose that to this clause of the building contract there were added the language "as in the judgment of the architect shall be just and reasonable." The right of the builder to additional time is not in the least destroyed by making the architect the judge of the *length* of time that will be reasonable.

And so here, when the specifications provided that should the contractors, by "freshets, ice, or other force or violence of the elements, and by no fault of their own, be prevented from * * * completing the work * * * at the time agreed upon * * * such additional time may, in writing, be allowed them for such completion as, in the judgment of the engineer, shall be just and reasonable," we contend that the language, rationally construed, means—and can only mean—that if the work is in reality prevented, not by their fault, but by "freshets, ice, or other force or violence of the elements," the contractors *will* or *shall* have a reasonable time to complete the work, and the mere fact that by an additional clause the *amount* of such additional time is to be "determined" by the "judgment" of the engineer in charge does not in the least deprive the contractors of the additional allowance of time provided in the contract.

Again (p. 30), counsel for defendant, speaking of the engineer, say "the contract provides that he may extend if in his judgment he deems it reasonable." Not so. The provision of the contract is very definite. All that is submitted by the contract to the judgment of the engineer is the amount of time to be allowed in case the completion of the work is prevented by the elements. The contract nowhere

makes the *right* of the contractors to a reasonable extension dependent upon the judgment of the engineer, *but upon prevention by "freshets, etc., * * * and by no fault of their own."* It merely refers to his "judgment" the question what, in the contingency of such prevention, is a "just and reasonable" extension of time.

It is true that if the engineer thought that the contingency upon which the contractors' right to an extension depended had not arisen—in other words, if he thought that the completion of the work was not in fact prevented by "freshets, ice, or other force or violence of the elements," so as to give the contractors such a right—he would not exercise his judgment as to what amount of time would be "reasonable and just;" but that is a very different thing from saying (as counsel for appellee do, p. 29) that "the right to extension of time, *in case of prevention by the force or violence of the elements*, could not be demanded by the claimants as a matter of right, but could only be appealed for as a matter of *grace*, trusting to the sense of 'justice and reasonableness' of the engineer in charge."

Indeed, even if the contract were much more stringent than it is, and provided that the engineer should by his "judgment" determine not merely what would be a "just and reasonable" amount of additional time to be given the contractors in the contingency of prevention by "freshets," etc, but if it had also left it to the engineer to judge whether the work had in fact been prevented by "freshets, ice, or other force or violence of the elements, and by no fault of their own," that fact would not create an autocratic power in the engineer, but could at most be held to vest him with the final *judgment* as to whether or not the contingency of prevention by freshets, etc., in fact occurred; and this judgment of the engineer the contractors would have the fair and legal right to insist that he should exercise one way or the other.

To test this proposition, suppose the case of a continuous

and irresistible freshet during the whole period of the contract; that the contractors were not in any fault whatever, and that the engineer should refuse to say whether or not they had been prevented by the freshets from doing their work, but in stead should go away to China and stay there, would not the contractors have the legal right to have the question determined by the court? It may be said we are supposing an extreme case. It is true, but it is within the extreme limits of the proposition of counsel for the appellees when they expressly contend that "in case of prevention by the force and violence of the elements," the contractors have no right whatever, but must depend entirely upon the "grace" of the engineer.

Learned counsel contend that plaintiffs are in effect asking the court, "under the guise of interpretation, to make a new contract for parties." On the contrary, we claim that if we were in fact thus prevented, not by our own fault, but by freshets, etc., from completing the work, then the contract itself provides for "such additional time" as "shall be just and reasonable," and that we are entitled to that additional time. So far, we submit, there is no departure from the contract.

The contract also provides that in that contingency the engineer shall determine how much additional time should, in his "judgment," be allowed. We may go further and even admit that he is empowered to determine according to his own "judgment" the prior question also whether freshets, etc., and not the fault of the contractors, prevented the completion of the work. We may go further still and admit that his "judgment" on both these questions is final, unless tainted by fraud, gross error, or equivalent defect; and, lastly, we may admit that there was no taint of fraud; and yet, upon the assumption of this argument of Government's counsel, the contract has been broken by defendant, because the engineer utterly failed to exercise his "judgment" as to whether the freshets did or did not in fact, or

even necessarily, prevent the completion of the work and thereby entitle the contractors to "additional time," such as "in the judgment of the [engineer] may be just and reasonable" (Findings X, p. 37; XXI, p. 41).

Counsel for defendant maintain that the contract did not make the engineer an arbitrator, because, they contend, an award involves mutual obligation to be bound by the award, and because, they say (32): "We look in vain through this contract for any provision whereby the parties have agreed to be bound by the decision of the engineer in charge of the work concerning his action in granting or refusing an extension of time."

With proper respect, we submit that the proposition is like saying that no provision in any written contract binds the parties to it, unless the contract singles out each and every particular provision and says they are to be bound by it. The Government and contractors expressly "agreed" to all the terms of the contract. One of those terms was that in the event of prevention of work by freshets such additional time may be allowed "as in the judgment of the party of the first part or his successor shall be just and reasonable." That is the language of the contract. If it is to be construed, as we claim, to have a just and reasonable meaning, it is a substantial term of the contract, and is one of those things to which the parties "agreed" and by which they are therefore bound.

The case of Gordon *vs.* U. S. (7 Wall., 188) is so wholly unlike the one at bar that we are unable to see how it can be relied on in support of appellant's position. There the whole point decided was that several resolutions and acts of Congress concerning a claim against the United States had not submitted the claim to the Second Auditor of the Treasury Department for an award, but, as the court said, "they were merely designed as instructions to the officer by which to adjust the accounts, Congress reserving to itself the power to approve, reject, or rescind, or to otherwise act

in the premises as the exigencies of the case might require. In other words, these references only require the officer to act in a ministerial and not a judicial capacity." The court found that "the act or resolution referring this inquiry to the Second Auditor did not authorize him to make a final adjustment of the matter embraced in it." [Whereas these contracts, binding both parties expressly, leaves the question of how much additional time to the judgment of the engineer.] "It did not bind the appellant to an acceptance of the amount reported by the Secretary."

Counsel for appellant have fallen into an error of fact to which the court's attention should be called. On page 22 of their brief they say:

"The contract provides that the engineer in charge of the work shall be given the discretion (subject to the approval of the Chief of Engineers) to grant such extension of time as in his judgment shall be 'just' and 'reasonable.'"

This is incorrect. The contract (Rec., p. 11) does, indeed, provide that "change in the *character and quantity*, whether of labor or material," must be agreed on in writing and approved by the Secretary of War, and the contract in its final clause (Rec., p. 15) says: "This contract shall be approved by the Chief of Engineers," but there is not a word in it to justify the idea that the exercise of the "judgment" of the engineer in charge as to what extensions of time "shall be just and reasonable" is subject to the approval of the Chief of Engineers or any one else.

It will not do, therefore, upon the erroneous hypothesis that the judgment of the engineer in charge was subject to the approval of the Chief of Engineers, to say that this judgment of the engineer in charge was not agreed upon by the parties as an arbitrament, but was only the performance of a ministerial duty to his superior, as in the Gordon case, for in fact the contract gives the Chief of Engineers no such revisory power.

Counsel for appellant, whilst admitting (p. 21) that the decision of the engineer may be reviewed under some circumstances and set aside for actual or constructive fraud, contend that this rule only applies to his decisions upon physical facts (such as "measurements," "quality and amount of work done," &c.) and say:

"In cases of this kind the courts have uniformly held "that where the contract provides that the decision of the "engineer in charge concerning these matters shall be final "said engineer acts in the nature of an arbitrator and that "when he makes his award under such contract, it is con- "clusive upon all parties, unless tainted with fraud or such "gross error as necessarily implies bad faith. But the de- "cisions of the courts in that class of cases can have no ap- "plication to a case like the one at bar, where the decision "sought to be reviewed is a psychological determination and "not an action upon the physical fact." Not so. First, there *was* no decision. It is of this we have complained. Secondly, the question submitted to the lower court was the very physical one, whether freshets made the completion of the work in the year given the contractors to do it impracticable. If so, they should have had "such additional time" as would have been "just and reasonable," and, the engineer having refused any, the court will not let them suffer by his wrong.

We understand counsel for appellant to contend that even if the engineer's decision is held to be reviewable by the court, it can only be set aside by the proof of actual or practical fraud committed against claimants, and that the evidence in the record discloses no fraud, actual or constructive. This contention is based upon a fatal assumption, namely, that the engineer did render a decision. In truth, he never did (Findings X, p. 37, and XXI, p. 41).

Now, the whole argument of counsel for appellant on this proposition is based on the idea that a "decision" of the

engineer is sought to be reviewed (which is not true, for there was no such decision), and they proceed to show that such a decision of the engineer cannot be set aside without actual or constructive fraud—a proposition which is admitted and immaterial, in view of the fact that a decision cannot be fraudulent which has never been rendered.

By way of summary, let us state our contentions as to the clause relating to extension of time for completing the work and the engineer's powers concerning such extension.

First. We contend that the clause does *not* make the engineer judge for or as between the parties of the question whether the completion within the required time was prevented by "freshets" without fault of the contractors; but that it distinctly limits his power to fixing the amount of additional time which may be allowed the contractors if prevented by freshets, etc., and not by fault of their own.

Hence, under this proposition, we contend that—

(1.) It is not necessary for the contractors to show that the engineer rendered no decision as to prevention by freshets, for such a decision would have been beyond his province.

(2.) It is not necessary to show that his decision was fraudulent or grossly erroneous, and for the same reason, namely, that the contracts gave him no power to render a decision on that point.

(3.) It is not necessary to show that his decision (if any) is reviewable, and that also because it was beyond his powers.

But if we should be wrong in our first proposition, namely, that the engineer was not given power to determine for the parties the fact of prevention by freshets, etc., and if it be

true that under the contracts he was authorized to determine this fact, so as to bind the parties, then we contend:

Second. That the appellees had a right to a decision from the engineer as to whether the completion of the work was prevented by the freshets, etc. But he made no such decision (Findings X and XXI, pp. 36, 41), and his failure to do so constituted a fraud in law on the rights of the contractors (Crane Elevator Co. *vs.* Clark, 80 Fed. Rep., 705).

Under this proposition we contend that:

(1.) The engineer (if he had the power to determine this question so as to bind the parties) was in the position of an arbitrator.

(2.) If (as is shown to be a fact by Findings XVII and XX, Rec., pp. 38, 41) it now appears that the non-completion of the work during the last extension was due to the "freshets," etc., without fault of the contractors, then they had the contract right to a further reasonable extension, *unless* the engineer in fact decided that they were not prevented by the freshets, etc.

(3.) It is settled by Findings X and XXI (Rec., pp. 36, 41) that the engineer rendered no such decision. The coro lary of this proposition is that the contractors had the contract right to the reasonable extension.

But, again, if we should be wrong in our second proposition also, and if we should grant that the engineer was authorized to determine for the parties the question of fact as to whether the non-completion was prevented by freshets, etc., or by fault of the contractors, and if we should grant also (notwithstanding the findings of the lower court to the contrary) that the engineer did in fact decide this question adversely to the contractors, then we contend:

Third. The decision of the engineer (assuming there was one) was so grossly erroneous that under the authorities it will be deemed constructively fraudulent, and be disregarded. Under this proposition we will merely refer generally to—

1. The official reports (Finding VII, pp. 34–36) and to Findings XVII (p. 38) and XX (p. 41), showing conclusively the "unprecedented" condition of the river, and that it would be an error so gross as to amount in law to a fraud on the contractors' rights for the engineer to have held that freshets, which made the completion of the works an impossibility, did not supervene during the last extensions.

2. If the engineer be supposed to have decided the contractors were in fault, it appears clearly that he made no distinction between previous concluded terms (prior to December 31, 1887, in case of the Upper work, and prior to August 31, 1888, in case of the Lower work) and the last extended terms of the contracts, "but based "his refusal" (and the Court of Claims finds this to be a fact) "to further extend the contract because, as he asserted, the claimants had for a *number of seasons* failed to complete the work."

Findings X, p. 37, and XXI, p. 41.

A refusal to extend *on such ground*, allowing waived and condoned faults (if any) to influence his judgment, vitally impairs the justice of his action and precludes it from being held to be final.

The engineer appears to have reasoned that if the contractors had done more excavation during the first part of the time allowed for the work prior to the last extension, they might have completed the work. Therefore they were at fault, and he would be doing them no unmerited damage

in refusing the last extension asked for on account of the freshets. If he was thus acting under the mistaken idea that he could take into consideration old and condoned faults, he could make a decision which in effect defrauded the contractors without intending to do so, justifying his action to himself by the above reasoning; but the *effect*, and not the intent, of the engineer's action must be considered in inquiring whether the contracts have been in fact broken by the appellants and the contractors virtually defrauded.

The engineer must exercise a sound and reasonable discretion (Opinion, Rec., p. 46) if his decision is to be held final. It must not be grossly fanciful or arbitrary. If the engineer had, on account of the freshets and in order to comply technically with the contract, allowed the contractors additional time, consisting of *one day*, such a finding would have absolutely taken away the rights of the contractors, enormously damaged them, and have amounted, in effect (though, perhaps, not in intention) to a fraud. Still more so if he should refuse, as he did in this case, even one day. Such a decision could not be held to be final. It would not be held to be *damnum absque injuria* unless there were no escape from such finding, and a means of relief exists under the exceptions to the finality of the officer's decision noted in Martinsburg R'y Co. *vs.* March, 114 U. S., 549, and cases there cited.

Perhaps we should refer to a few inaccuracies in appellants' brief lest the court be misled.

On page 2 it is said:

"The season from August, 1885, was unusually favorable for the prosecution of this character of work, yet the contractors *wholly by reason of their own wrong, default and neglect*, failed to perform the work." * * * (The italics are ours.)

In several other places the same idea is reiterated. Yet the findings of the lower court contain no such conclusion. In its opinion (Rec., p. 44) it expressly says:

"As to whether the extensions or allowances of additional time prior to December, 1888, were or not granted on sufficient grounds, we are not called upon to decide. * * * Both parties treat the extensions as having been made on sufficient grounds. * * * so that, for the purpose of these cases, we have only to do with the contracts as last extended." * * *

As we have seen, our contention has been that the extensions which were granted having been, presumably, granted upon sufficient grounds and having eliminated all necessity for inquiring into those grounds, there was no occasion for the contractors to prove that they had not been in default. Moreover, as the lower court says:

"Whatever delays or defaults on the parts of the claimants may have occurred prior to the last extensions of the contracts were waived by the defendants when the extensions thereof were granted; no forfeitures were declared at the time, and by the several extensions were waived, and once waived, cannot be revived."

Pigeon's case, 27 Ct. Cl. R., 167, 175.

On page 2, appellants' brief says:

"As a matter of grace and without any pretense of right, they [the contractors] asked that the time for the completion of their contract be extended." * * *

The same idea is reiterated. We submit that it is not warranted by the record, is not found in the findings of fact, and is immaterial for the reasons just given.

On page 3, appellants' brief says, with reference to the year 1887:

"The failure of the claimants to complete the same was not in anywise due to the force or violence of the ele-

ments, but wholly to their own fault or neglect (Finding XIX, Rec., p. 39.)"

A reference to the finding will, we think, show that the lower court did not find either of the facts asserted. On the contrary, both the findings and the opinion show that the court did not feel called upon to consider the causes of failure to complete the work prior to the last extension in 1888.

The statement on page 4 of appellants' brief that the engineer refused the last extension asked for reasons there stated is, we think, in direct opposition to Findings VIII and X (Rec., p. 36), and is apparently based entirely upon the affidavit of the engineer filed in support of the motion for a new trial. This affidavit is elsewhere discussed fully.

The contractual meaning of "may," having the effect to "entitle as of right" to an extension of time in the event of prevention by freshets, is distinctly admitted at the top of page 7 of Appellants' Brief; also at the bottom of page 8, where it is stated "then they might be *entitled* to such additional time," etc. This is exactly the meaning for which the appellees contend. The counsel for the appellants then proceed to show that the provisions for additional time in case of freshets, etc., did not continue beyond the original terms of the contracts and had no existence during any of the extensions of either contract.

It is very difficult to follow the argument. The learned counsel appear to realize it themselves at the bottom of page 11 of their brief, where, after arguing that the contracts as extended contained and consisted of the element of time only, and that "the legal rights and duties which flowed from" the contracts were not extended, they feel obliged to add, "Of course the work was to be done in the manner "set forth in the plans and specifications, and the pay-"ment for the work was to be made," etc. If all of these parts and provisions of the original contracts subsisted in the extensions, whence do the learned counsel

derive the authority to drop out from the contracts as extended the original provisions as to additional time in case of freshets? Why not drop out any other provision at random; for instance, that by which the contractors were entitled to 85 cents per cubic yard, or that by which they had a property in the excavated rock, or that by which the Government had power to annul for laches? Further on the counsel for the appellants argue (pages 14, 15 of their brief) that a guarantor is not held if a contract be "changed," and therefore the clause "but such allowance and extension shall in no manner affect the rights and obligations of the parties," etc. (Rec., p. 11, fol. 20), is necessary to hold the sureties on these contracts. We may ask, What becomes of the obligations of such sureties if the original contracts be "changed" to the extent of holding the contractors to unlimited performance even if freshets supervene? It does not seem possible that, where contracts are extended in point of time for performance without any other new agreements, any other view can be taken than that all clauses and provisions of the contracts not already fulfilled are equally extended and have effect during such extended time.

As to the sufficiency of the findings of the Court of Claims to sustain the judgment, we submit:

It was not for the Court of Claims to find for what specific times the contracts ought reasonably to have been extended. It was for the engineer officer to have fixed such time. An extension of reasonable time means simply time reasonably sufficient for the completion of the work, considering its condition. It is a sufficient basis for the judgment for that court to find (*a*) the facts which constituted breaches of the contracts on the part of the appellees, namely, the refusal to allow (Findings X, p. 36, and XXI, p. 41) the additional time promised in the contracts in case of freshets, etc. (Rec., pp. 11, 24).

(*b*.) The damages resulting to the appellees from not per-

forming the contracts, namely (1), the loss of the retained 10 per centum (Findings XI, p. 37, and XXIII, p. 41). This is clearly recoverable under the decisions referred to in the opinion below, where the court says, "The defendants concede that the claimants are entitled to recover" (Rec., p. 50). This is also admitted in Appellants' Brief (p. 48).

(2.) The profits which the appellees would have reasonably made by completing the contracts.

These immediate prospective profits are distinctly found by the court below (Findings XII to XVI, pp. 37, 38, and XXIV, XXV, pp. 41, 42).

It is presumed that a contractor will perform his contract if permitted by the other party. One party cannot commit a breach of a contract and then be permitted to say in justification or excuse that even if he had not so broken it the other party never would have performed it.

If the Government did not finish the work in 1889 (Appellants' Brief, p. 40), that is immaterial to the question of appellees' completing the works. On the Upper work they had completed 35,435 yards, and the Lower work was nearly finished, the appellees having excavated over 90 per cent. of the amount required by the contract (Findings XII, p. 37; XXIV, p. 41; XXV, p. 42). In this connection attention is called to a material error on page 39 of Appellants' Brief, where the amount excavated by the appellees is stated as 14 per cent. On the contrary, they had completed over 60 per cent. of the two contracts taken together.

It is also to be borne in mind that for the season of 1888 the appellees provided expensive additions to their plant, which they were prevented from using to any extent by the freshets (Findings VIII, p. 36; VII, p. 34; XVII, p. 38).

With an extension of a reasonable amount of time and the aid of this plant the contracts could easily have been completed.

THE APPELLEES' APPEAL FROM THE ORDER OF THE COURT OF CLAIMS OVERRULING A MOTION FOR A NEW TRIAL.

It is submitted by the appellees that the question of a new trial in the Court of Claims was settled finally by the trial court, acting in its sound discretion, after a consideration of all the evidence, and particularly after a comparison of the evidence in support of the motion for new trial, with the other evidence in the case.

From such a decision the appeal taken herein (Rec., p. 55) does not lie, and the order of the Court of Claims denying a new trial is not subject to review by this honorable court.

The just determination of the question of a new trial requires a knowledge and consideration of all the evidence, both that upon which the original judgment upon the merits was reached and that presented in support of the motion. The court below had such a record before it in passing upon the motion, but this honorable court has not.

The language of the statute (Rev. St., 1088) leaves the question of granting a new trial entirely to the Court of Claims and to no other tribunal. No appeal to this court from the grant or refusal to grant is provided for. An appeal certainly would have been provided for if intended, for to make the determination of such a question in the trial court appealable would be extraordinary and possibly not "according to the rules of the common law" (Constitution of the United States, 7th amendment).

The motion for new trial was made upon no grounds except such as related entirely to the discretion of the trial court (74).

If the court below had declined to *entertain* the motion for a new trial, it would be within the jurisdiction of this honorable court to cure such an error, and by mandate di-

rect the court below to consider the motion and exercise its discretion thereon.

Metropolitan R. Co. *vs.* Moore, 121 U. S., 558.

But without undertaking to limit or direct such discretion.

Ex P. Russell, 13 Wall., 664.
Belknap *vs.* United States, 150 U. S., 591.

Or to review it.

Blitz *vs.* United States, 153 U. S., 312.
Addington *vs.* United States, 165 U. S., 185.
Wabash R'y Co. *vs.* McDaniels, 107 U. S., 456.
Willis *vs.* Board of Comm'rs, 86 Fed. Rep., 877.
And cases there cited.

But the court below has not abridged any right of the appellants. The motion has been heard and determined in the sound discretion of the court, cognizant of all the evidence.

The findings of the Court of Claims in an action at law determine all matters of fact, like the verdict of a jury (U. S. *vs.* New York Indians, Supreme Court, March 20, 1899, and cases there cited). Certainly, the finding of the Court of Claims on a question of fact or new trial is final, like that of a trial judge after a jury trial.

The appellants based their motion for a new trial partly upon an affidavit of Colonel Stickney (Rec., p. 51).

While this affidavit does not seem to be in any way material or competent evidence upon any question which can properly arise in this court, yet some importance seems to be attached to it by counsel for the appellants, and it will be briefly discussed.

The findings were reconsidered by the court upon motion of the appellants (Rec., p. 54), amended, and made in their present form after consideration of this affidavit (Rec., pp.

52–54). So far as the affidavit fails to agree with the findings it is overcome by the latter (Zeigler *vs.* Hopkins, 117 U. S., 683).

Examining the affidavit in detail, we find it states five grounds upon which the engineer refused to grant the appellees further extension of time. The first contains two assumptions of fact, namely: "The failure of Gleason and "Gosnell to either finish their work at the time called for "by the last extension of the contracts, or to make proper "provisions for carrying on the work." The court below, however, finds the facts that the freshets of the river were unprecedented and prevented the appellees from completing the work within the time allowed (Finding VII, p. 34); that no act or omission of the claimants during the period of the last extension prevented them, and that they were diligent in preparing for the work, in prosecuting it, and in endeavoring to exclude the water and freshets of the river (Finding VIII, p. 36).

The second ground of the affidavit is "that the said con-"tractors did not fulfill the conditions upon which their "time had already been extended." The court below finds to the contrary (Finding VIII, p. 36).

The third ground of the affidavit is "that the lenience "already shown said contractors in extending one of the "contracts twice and the other three times had not brought "forth such efforts on the part of the contractors as the cir-"cumstances required." If this statement refers to efforts prior to the last extension it confirms Findings X (Rec., p. 36) and XXI (Rec., p. 41), to the effect that the engineer based his refusal to extend the contracts upon the assertion that the claimants had for a number of seasons failed to complete the work within the times agreed upon; but these failures, even if due to fault of the claimants (appellees), had been condoned by the appellants by subsequent renewals of the contracts *for their own interest and benefit* (see letters of engineer, Rec., pp. 33, 39), and could not thereafter be re-

vived against the contractors (Pigeon's case, 27 C. Cl. R., 167, 175; opinion, Rec., p. 44).

If this statement of the affidavit refers to efforts during the last extension, it is contrary in fact to Findings VIII (Rec., p. 36) and XX (Rec., p. 41) and is overcome thereby.

The fourth statement of the affidavit is in substance the same as the third.

The fifth statement is "that the faults of the said con-"tractors deprived them of the right to demand further "extensions." The affidavit leaves undetermined the time of the alleged faults. Presumably they were prior to the last extension, for the findings show that there were no faults during the period of the last extension (Findings VIII and XX, Rec., pp. 36, 41).

This statement of the affidavit confirms Findings X and XXI (Rec., pp. 36 and 41) that the engineer based his refusal to extend on prior faults. If the affidavit means that there were faults during the last extension, it is contrary to Findings VIII and XX (pp. 36, 41).

A final statement of the affidavit is "that he exercised "his judgment in the fullest degree upon the contractual "stipulation relating to extension of time, taking into con-"sideration all of the facts of the case."

This is contrary to Findings X and XXI (Rec., pp. 36, 41), which were based not only on the testimony of the engineer, which differed from his affidavit, but on evidence of what his statements were at the time he refused a further extension of either contract. It may be added that these findings were amended by the court below and made in their present form after consideration of the affidavit.

This general fault-finding affidavit is negatived with some force by the fact that after the appellees had been at work nearly half (42 per cent.) of the total time spent on the contract for this Upper work, this affiant entered into a contract with the appellees for the performance by them of the Lower work (Finding XVIII, p. 38).

Upon principle and precedent the appeal from the or
of the court below overruling the motion for a new t
should not be entertained by this honorable court.

As bearing on the merits of the case, it is submitted t
to give any consideration or weight to this affidavit wo
be contrary to all sound practice and precedent, becaus
is not accompanied by the whole mass of evidence wh
the court below considered and weighed in arriving at th
findings, and that the *findings only* are to be accepted as
rectly stating the facts established by the evidence.

The reference to the affidavit (taken entirely *ex parte* a
never admitted below as evidence on the merits) made
page 26 of the Appellants' Brief, and all argument ba
thereon, therefore seems incompetent and improper.

It is submitted, in conclusion, that the judgment of
court below should stand.

TEMPLE BODLEY,
H. N. LOW,
Attorneys and of Counsel for Appellee

JOHN G. SIMRALL,
Of Counsel.

No. 59.

Brf. of Bodley, Low & Simrall for Appellees (reargument)

Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Dec 4 1899. No. 59.

THE UNITED STATES, APPELLANTS,

vs.

JOHN R. GLEASON AND GEORGE W. GOSNELL,
APPELLEES.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR APPELLEES, ON REARGUMENT.

TEMPLE BODLEY,
H. N. LOW,
Counsel for Appellees.

JOHN G. SIMRALL,
Of Counsel.

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vs.

JOHN R. GLEASON AND GEORGE W. GOSNELL, APPELLEES.

APPEAL FROM THE COURT OF CLAIMS.

Supplemental Brief for Appellees, on Reargument.

In each of the two consolidated cases involved in this appeal the question is whether there has been a breach by the United States of a contract with appellees for the enlargement by excavation of the Louisville and Portland canal "at the falls of the Ohio river," the appellees claiming that such a breach did occur by reason of the appellants' wrongful refusal to extend the contract period for completing the work as required by a clause in the contract providing additional time in case of prevention by freshets. The con-

tract was made "for and in behalf of the United States" by the engineer in charge of the work. The cases having been ordered to be reargued without reference to any particular questions, it becomes necessary to make a general review of them. Whilst relying on our former brief for many details of the cases, both of fact and law, we present in addition the following statement and argument as to what appear to be the more important questions which arise on this appeal. Since the questions involved in the two cases are substantially the same, we shall here discuss those involving the "Upper work," the other differing in comparatively unimportant respects.

SUMMARY OF THE MOST MATERIAL FACTS.

The record warrants, we believe, each of the following statements, which may help to clear the way for a distinct view of the turning points in the case:

1. The rock "was in the river bed in an exposed situation and was exposed to great force of the river when the river rose" (Finding V, p. 34).

2. Before the contract was made the specifications prepared by the Government engineer, "the party of the first part, . . . for and on behalf of the United States," were exhibited to the contractors, and they contained a clause that the contractor "must begin work within twenty days after notification that his bid has been accepted, *unless hindered by high water*," and also a clause that the contract would provide "that additional time may be allowed to a contractor for beginning or completing his work in cases of delay from '*freshets, ice or other force or violence of the elements and by no fault of his or their own*'" (Finding VI, p. 34).

These specifications did not inform the contractors that if they should, in fact, be thus delayed by "freshets, . . . and by no fault of his or their own," the

allowance of additional time was to depend on the discretion of the engineer, either as to their right to any allowance at all or as to the amount of time to be allowed. On the faith of these provisions in the specifications the contractors entered into the contract (Finding VI, p. 34).

3. The provision in the contract differs materially from the statement of it in the specifications in this: That in the contract there is the added clause "*such . . . as in the judgment of the party of the first part, or his successor, shall be just and reasonable.*"

4. The whole proviso concerning extension of time for completion of the work in the contingent event of its being prevented by freshets, ice, or other force and violence of the elements and by no fault of their own (which contingency we shall, for brevity's sake, hereafter refer to generally as "prevention by freshets")—consists of three parts, first, the statement of the *contingency;* secondly, the *result of that contingency,* namely, the extension, and, thirdly, the *effect of the extension* upon the terms of the contract. The proviso (with the clauses numbered and the added clause above mentioned italicized) reads as follows:

(1) "If the parties of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, (2) *such* additional time may in writing be allowed him or them for such commencement or completion *as in the judgment of the party of the first part or his successor shall be just and reasonable;* (3) but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforcible precisely as if the new date for such commencement or completion had been the date originally herein agreed upon" (Finding I, p. 31).

(It will be observed that in the first clause of the proviso, stating the *contingency* of prevention by freshets, upon the happening of which additional time may be allowed, no reference is made to the judgment of the engineer. In the second clause, stating the *result* of that contingency, namely, the allowance of additional time, the material added words above referred to are "Such . . . in writing as, in the judgment of the (engineer), shall be just and reasonable."

How liberally these added words should be construed to give discretionary powers to the engineer—whether upon the happening of the contingency referred to (namely, prevention of completion of the work by freshets and not by fault of the contractors) they should be construed to simply empower him to decide *how much* time "shall be just and reasonable," or whether they should be so liberally construed in favor of the Government as to give its engineer, the nominal "party of the first part," power to decide both for the Government and the contractors whether they have in fact been prevented by freshets—these are the main issues of the case to be discussed presently.)

5. The contract is in the usual form provided *by the Government* (Finding VI).

6. The contract provides for the excavation, at the rate of 85 cents per yard, of 110,000 cubic yards, "more or less," of solid rock. (The final estimate of the Government's engineer was 118,935.22 yards.) (Finding XII, R., 37.)

7. The contract provides that in case the contractors fail to begin work at the time agreed, or fail "in the judgment of the engineer in charge" to prosecute the work diligently, the engineer shall have power, *with the sanction of the chief of engineers*, to *annul* the contract (p. 31).

The annulment clause (p. 31) reads as follows:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, *with the sanction of the chief of engineers*, to *annul this contract by giving notice in writing to that effect to the party or parties* (or either of them) of the second part, and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States."

Finding I, Rec., p. 31.

8. The contract was *never annulled* (Finding X, p. 36).

9. The original period for completion of the work (August 20, 1885, to December 31, 1886) was extended twice, the last extension being for the year 1888.

10. The first extension (for 1887) was requested by the contractors, was granted them, and was evidenced "in writing" by a formal "supplemental contract," which was made "subject to approval of the Chief of Engineers," and was approved by the acting Secretary of War, the superior of the Chief of Engineers (Finding III, p. 32). It contained several material though minor changes in the contract requirements as to methods of doing the work.

The second and last extension (for 1888) was applied for in a letter of the contractors to the engineer in charge proposing other material changes of method of working. He forwarded the letter to the Chief of Engineers for approval, and, for "the interests of the Government," recommended its concurrence in the exten-

sion, and thereupon the extension "was granted and approved *by the Chief of Engineers* 'on condition that the provisions of their application are faithfully carried out,' of which approval the claimants were *notified* in writing" by the engineer in charge by a letter addressed to them stating that the time for completion "is extended to December 31st, 1888," on the conditions mentioned.

11. The Court of Claims did not feel called upon to decide (Opinion, R., 44) and did not decide upon what grounds either of these extensions was granted. It did not decide that they were occasioned by the fault of the contractors (appellants' brief in stating it did is erroneous). On the contrary, it held that any such faults (if there were any) were waived by the parties at the time the extensions were given (R., 44).

12. The last extension, for the year 1888, having been granted on conditions mentioned in the letter of the contractors to the engineer, wherein additional plant and force sufficient to remove 640 yards per day were required (Finding IV, pp. 32–34), the Court of Claims found that "during the working season of 1888 the claimants *were diligent*" (1) "in the prosecution of the work," (2) "in preparing therefor," and (3) "in endeavoring to exclude the water and freshets of the river" (Finding VIII, p. 36).

13. The subordinate facts are also (we think needlessly) found that they did provide the additional plant required and had it ready for operation at the beginning of the season (Finding VIII, p. 36). But "the condition of the Ohio river was, during the season of 1888, the period of the last extension, unusual and unprecedented for repeated and continued freshets and high water, . . . in consequence of which freshets and high water the working season of 1888 . . . was limited to about thirty-five days" (Finding VII, p. 34), and "the

time remaining for active work, after deducting the time when it was impossible to work on account of high water and freshets, was insufficient for the completion of the work under the contract within the period of extension, and it was impossible for claimants to complete the work within the time thus remaining" (Finding XVII, p. 38). "There was insufficient working time to complete the work by December 31, 1888," even at the rate of 640 yards per day, "and this from no fault of the claimants during the last extension" (Finding VIII, p. 36).

14. "No act or omission of the claimants during the period of the last extension made it impossible to complete the work by December 31, 1888" (Finding VIII, p. 36).

15. The contract provided that the rock to be excavated "will be the property of the contractor" (Finding XIV, p. 37).

16. The remaining rock amounted at the expiration of the last extension to 83,500 yards (Finding XII, p. 37).

17. The cost of removing it would have been $1.25 per yard, or $33,400 (Finding XIII, p. 37).

18. Every yard of the rock when broken would yield 1½ yards of broken stone, the 83,500 yards remaining to be excavated thus amounting to 125,250 of broken stone (Finding XIV, p. 37).

19. This broken stone had a ready market in Louisville at $1.25 per yard (Finding XV, p. 37).

20. The cost of crushing and delivering the rock for this market was 50 cents per yard; the net value to claimants of the crushed and delivered rock, 75 cents per yard, or $93,937.50 for the 125,250 yards. This, less $33,400, the cost of removing, left a net profit of $60,537.50 (Finding XVI, p. 37).

21. The claimants applied to the engineer for addi-

tional time to complete the work, because they had been prevented from completing it "by freshets and force and violence of the elements and by no fault of their own" (Finding X, p. 36), he being, in his representative character, the party of the first part in the contract and the uniformly recognized intermediary between the contractors and the Government for the purpose (Rec., pp. 32, 33, 34, 39, 40, 41).

22. (*a.*) The engineer refused to allow any additional time (*id.*).

(*b.*) He did not "find or decide that they were not so prevented" (*id.*).

(*c.*) He did not give any judgment or decision whatever on the question as to whether they were or were not so prevented (*id.*).

(*d.*) He "based his refusal to further extend the contract because, as he asserted, the claimants *had for a number of seasons failed to complete the work within the time agreed upon*" (Finding X, p. 36). (He did not base his refusal upon any neglect or fault of the claimants, *even prior to 1888*, but based it simply upon the very obvious fact that the work had not been completed, thus treating the prevention by act of God, without fault of the contractors, as immaterial.)

23. Every extension granted under either of these contracts was granted, so far as the record shows, for the "interests of the Government" (R., pp. 33, 39, and 40).

24. As the power of the "engineer in charge" to grant or refuse an extension is the main point of the case, we will here refer to his powers.

(*a.*) He has no power alone to make the contract, but *only with the approval of the Chief of Engineers.* The original and supplemental contracts alike provided that: "This contract shall be subject to the approval

of the Chief of Engineers." (See contract, p. 15; supplemental contract, p. 16.)

The first extension (for 1887) was allowed by a formal "supplemental contract" which was *approved by the Secretary of War*, the superior of the Chief of Engineers (R., p. 32).

The second and last extension (for 1888) was *recommended* to the Chief of Engineers by the engineer in charge, and it "was *granted and approved* by the *Chief of Engineers*" (Finding IV, p. 34), and thereupon the engineer in charge *notified* the contractors ("in writing") that "the time for completion . . . is extended," &c.

(*b.*) The engineer in charge cannot change the project so as to increase or diminish the cost, but before taking effect any agreement for it must be approved by the Secretary of War (Rec., p. 11).

(*c.*) The contract provides (R., p. 10): "The decision of the engineer officer in charge *as to quality and quantity* shall be final."

(*d.*) Also any agreement for extra work or materials must be approved by the Chief of Engineers (R., p. 11).

(*e.*) *With the sanction of the Chief of Engineers*, the engineer in charge has power to annul this contract by giving notice in writing to that effect in the event that either (1) the contractors delay beginning the work or (2) "shall, in the judgment of the engineer in charge, fail to prosecute . . . diligently the work," &c.

(*f.*) The engineer is given power to direct the work in certain respects (R., p. 12, par. 2; p. 26, pars. 3, 8; p. 27, pars. 13, 18; p. 28, par. 24).)

(*g.*) Lastly, the freshet proviso, which is the special subject of contention, says that in case of prevention of completion by freshets, &c., "*such* additional time may in writing be allowed them *as*, in the judgment of the engineer, shall be just and reasonable."

We believe we have now stated in general form the substance of all the material facts found by the lower court. The retained percentages are not in dispute, appellant conceding the right to recover them. The conduct of the work prior to the last extension period (1888) we have considered immaterial, as did the lower court. There is *no* finding that prior to 1888 the claimants were in fault, or that they were not in fault. The court simply presumes that as "both parties treat the extensions as having been made on sufficient grounds, we have only to do with the contracts as last extended" (Rec. p. 44). There were new and material terms added to the contract at the time of the last extension, which made it, as a whole, a new contract, to which previous faults, even had they been found, would have no application. For this reason and because the subject is referred to in our original brief, we do not discuss it here. For like reason we do not embrace in this summary the particular findings as to freshets each month during 1888, sustaining the finding that the completion of the work that year was impossible and prevented by freshets. Likewise the finding that the force of the Government did not complete the work in three years after 1888, we deem unimportant, as merely subordinate *evidence* of the difficulties of performance, conducing to prove that the prevention was caused by freshets and not by the fault of the contractors. Whereas, as we have seen, the court has elsewhere found that the completion of the work was made impossible and prevented by the freshets, and it has elsewhere found that the contractors *both in preparing for and conducting the work* "*were diligent*," and this renders the particulars of diligence or want of diligence wholly immaterial and any findings concerning them supererogation. When the Court of Claims has found that the contractors, during the period of the last extension, (1) *were prevented by freshets*, and (2) "*were diligent*" (*a*) in *preparation* for the prosecution of the work, (*b*) in the *prosecution* of the work, and (*c*) in *endeavoring to ex-*

clude the water and freshets of the river (Finding VIII, p. 36), we contend that this finding covers the whole field of performance of the terms and conditions of the contract during that period, including any omissions or faults charged against them during that period in the pleadings or evidence in the court below. We think, therefore, that your Honors will find this summary to contain the substance of all the facts found that are material to the questions to be considered.

ARGUMENT.

The Court of Claims having, by its findings, established the fact that the parties of the second part were by freshets, ice, or other force or violence of the elements, and by no fault of their own prevented from completing the work at the time agreed upon, we contend:

First. That the contract gave the appellees the legal right to "such . . . additional time . . . as shall be just and reasonable," the *amount* to be fixed by the engineer in the exercise of a just and reasonable discretion.

Under this general proposition we contend:

1. That when the contract says that in case the completion is prevented by freshets, etc., and by no fault of their own, "*such* additional time *may* be allowed" them, the word "*such*" means "*so much*"—"*such amount of*"—time, and "*may*" means "*will*" or "*shall*" "be allowed them."

2. That when it provides that "*such* additional time" may be allowed "*as*, in the judgment of the (engineer), shall be just and reasonable," it refers to his decision the question what is "*such* additional time" as will be "just and reasonable," but it does not make him judge to determine, both for his principal and the appellees, the question whether they have in fact been so prevented by the act of God and not by fault of their own.

Second. That the appellees had the right to the judgment of the engineer as to how much additional time would be just and reasonable and to be allowed that additional time; but he having refused to exercise his judgment or to name any time at all, the further performance of the contract was wrongfully prevented, and the appellees are entitled to damages.

Third. That this clause was never abrogated or exhausted of force by the first extension of the period for completion of the work, as contended by counsel for appellants, but that it remained a vital part of the contract as extended.

Fourth. That the damages awarded by the Court of Claims were not uncertain or remote, but were properly awarded.

We propose briefly discussing these propositions in the order given with a special view to the points which, judging from questions asked of counsel on the former hearing, we suppose may be considered pivotal by your honors. We shall endeavor to avoid repeating anything stated in our original brief which may not be necessary to make clear the argument of this.

First.

We contend that the contract gives appellees the legal RIGHT *to "such . . . additional time . . . as . . . shall be just and reasonable," the* AMOUNT *to be fixed by the engineer in the exercise of a just and reasonable discretion.*

Counsel for the Government, on the contrary, contend that it gives no legal right at all, but say (Brief, p. 29):

> "The right to extension of the time, *in case of prevention by the force and violence of the elements*, could not be demanded by the claimants as a matter of right, but

could only be appealed for *as a matter of grace*, trusting to the sense of 'justice and reasonableness' of the engineer in charge."

I. We have seen that this work was in the bed of the Ohio river at Louisville and exposed to great force of the river and impossible to be carried on during high water.

In construing the intent of the contract, the court will consider the surrounding circumstances. Is it reasonable to suppose that the parties intended that there should be no contract relief against such foreseen violence of the elements plainly making unavoidable delays probable, if not certain? On the contrary, we apprehend that this salient fact was regarded by the parties and should be regarded by the court as the most important circumstance of all those surrounding the parties when the contract was made and shedding light upon their intent. These freshets and high water are referred to many times in the contracts and specifications.

There is a contemporaneous construction given to the language under discussion which is very significant. As we have seen, in the specifications prepared by the engineer himself and exhibited to the appellees before the contract was entered into, "they were advised that *their contract would provide* 'that *additional time may be allowed to a contractor for beginning or completing his work in cases of delay from freshets, ice, or other force or violence of the elements and by no fault of his or their own*'" (Finding VI, p. 34). This partial quotation in the specifications of the clause to be contained in the contract was misleading in this respect: whereas by the words used in the specifications each party would be left to determine for himself and both parties to agree as to the amount of the additional time, in the contract a referee was appointed to fix its amount. In the contract the additional time to be allowed was stated to be "*such . . . as*, in the judgment of the party of the

first part, shall be just and reasonable." It is true, of course, that the contractors signed this contract and are bound by its terms; but the character of the work to be done and the promise held out in the specifications, which meant, if it meant anything, that the contractors were not to be held to unlimited performance if prevented by the act of God are persuasive not only (1) that they did not mean to agree to stake their large investment of money and time upon the mere "grace" and "sense of 'justice and reasonableness' of the engineer" in case the act of God prevented their completion of the work in the very limited time allowed them, but (2) afford strong reason for so construing the contract as to limit rather than enlarge the powers of the engineer, and (3) for construing the language used in the contract to have the same meaning and to give the same contractual right to an extension as would have been given by the words used in the specifications, excepting only that the power to ascertain the *amount* of time which "shall be just and reasonable," having been expressly referred by the added words to the engineer, is vested in him by those added words. Representing the United States, he is the "party of the first part." He occupies the double relation of adverse party and arbiter between himself and the contractors. That fact alone should resolve every implication as to his powers in favor of the appellees. The form of contract was furnished by him—a form prepared by the Government—and containing throughout most elaborate and stringent protective clauses for the benefit of "the party of first part." That is another reason for strictly construing his powers. So much as to the situation of the parties when the contract was made.

II. When the contract says that "if the (claimants) shall by freshets or other force or violence of the elements and by no fault of his or their own be prevented . . . from . . . completing the work . . . at the time agreed upon, *such* ad-

ditional time may in writing be allowed . . . them for such . . . completion *as* in the judgment of the (engineer) shall be just and reasonable," we contend that the words "such as" mean "so much as," "such amount as," and that "such additional time," etc., means "so much" or "such amount" of "additional time as in the judgment of the (engineer) shall be just and reasonable."

A. It will be noted that the proviso under discussion consists of two entirely distinct clauses. The first states the *contingency* of prevention by freshets, etc. The second prescribes the *result* of the happening of that contingency. If the first clause stating the contingency had been intended to make the engineer judge of the happening of this contingency, the clause would presumably have said so. But it did not. He is not mentioned in it. It does not say, "If *in the judgment of the engineer* the (contractors) shall by freshets, etc., be prevented," but it merely states a physical contingency, saying, "If the (*contractors*) *shall be prevented* by freshets," etc. This first clause of the proviso, therefore, does not purport to refer to the engineer's decision the question whether the contractors have been prevented by freshets, etc. If he has such authority, it must be found in the second clause of the proviso. But the second clause merely states the result of the happening of the physical contingency of prevention by freshets, etc., and says that in that event "*such* additional time may in writing be allowed them . . . *as*, in the judgment of the (engineer), shall be just and reasonable." That language is, we submit, precisely the same as if the clause read "additional time may in writing be allowed them, *such as shall be just and reasonable* in the judgment of the engineer." Here it is evident that the question for the engineer is, What is "*such as* shall be just and reasonable"? This transposition only makes clearer the fact that the language refers to the engineer's judgment only the *amount* of additional time.

B. But it will be said that whether the engineer was or was not vested with authority to determine, both for the Government and the contractors, whether they were prevented by freshets, etc., still, since the result of such prevention is only that additional time "may" be allowed them, they have no contract right to any allowance whatever, but are relegated to the "grace" of the engineer in charge.

This brings us to the discussion of the second clause of the proviso:

> "Such additional time may in writing be allowed . . . them . . . as in the judgment of the (engineer) shall be just and reasonable."

Counsel for appellees contend that "may" is here merely permissive; that the engineer "may" or he may not allow additional time.

This contention is, we think, fatally defective for two reasons: First, because it assumes that the allowance of time is not ordained by the contract itself upon the happening of the contingency mentioned in the preceding clause, but is left to the engineer, and, secondly, because the word "may" is not here used in such permissive sense.

Let us examine these propositions.

The contention that additional time is not allowed by the contract itself, *ex proprio vigore*, but is to be allowed *by the engineer*, is, we think, due to confusion arising from the mere propinquity of words not directly related; and it would necessitate the interpolation into the clause of words which are not there and which would vitally alter its meaning. In case of prevention by freshets the clause simply says: "Such additional time may in writing be allowed . . . them as in the judgment of the (engineer) shall be just and reasonable." It does not say how or by whom it

is to be allowed, nor that any particular person is to allow it. It simply binds the parties by its terms and says that in the contingency provided it "may be allowed *them*," the contractors. But appellees' contention would necessarily make the clause read, "Such additional time may be allowed them *by the engineer* as in the judgment of the (engineer) shall be just and reasonable." The words "may be allowed" do *not* refer to the engineer, but to the *contractors*. The clause does not provide that the additional time may be allowed "*by the engineer*," but simply that it may be allowed "*them*." It is not intended to express the contingency of *his allowing*, but of *their receiving* additional time. It does not *express* a power on his part to allow additional time, but indicates merely the *privilege to them* which the contract, of its own force, provides as the result of prevention by freshets, namely, that the contractors "may be allowed" additional time—in other words, may *have* additional time.

It will be observed that it was not necessary to the validity of the contract that the contingency of prevention by freshets, or the allowance of the extension, or even the fixing of the amount of it should be left to the engineer or to any one else to determine. And if any special power is given to the engineer by the contract, such power should not be enlarged by construction; on the contrary, every doubt should be resolved against enlarging his power. The contract would be quite as *valid* if he had not been mentioned in the proviso at all, but it had read:

> If the (contractors) shall by freshets . . . be prevented, . . . such additional time may in writing be allowed them for such completion as shall be just and reasonable.

If each and all of the several terms of the clause thus written can be given full effect without reference to the engineer at all, then we submit that there is no need by *implication* to make any of them depend upon his judgment,

especially if, as we have seen, this necessitates interpolation of material words into the contract. That every term of the clause thus written can be given full effect is, we think, clear. The question of prevention by freshets and not by fault of the contractors would be one which the United States, by its authorized agent, would determine for itself and the contractors would determine for themselves, but which neither would decide for the other. Should they disagree, they have the usual remedies in court.

Whether the contractors would be entitled to reasonable further time would likewise be determined by each party for himself, with the right to appeal to the law in case of disagreement. What would amount to a reasonable time would be a question about which they might also differ and would have the like rights and remedy.

If the contractors were right on these questions they would have the right to have the additional time allowed them by the other party in writing. There is nothing novel or unusual about these propositions, for they are like those applying to very many contracts in our daily experience. Provisions for arbitration (and especially by the agent of one of the parties to the contract occupying a dual relation of formal party and arbitrator) are exceptional and not the rule. Now, surely, because in the second clause of the proviso the engineer is made judge of the *amount* of time that is just and reasonable, it does not follow that he is to decide whether any time at all shall be allowed, notwithstanding prevention by freshets, or that he is to decide whether the contractors were thus prevented, to say nothing of having a power so broad as to put the contractors absolutely at his mercy and legally justify him in inducing them to incur great outlays for the prosecution of their work, and then denying them any real opportunity to prosecute it. We submit that since every one of the terms of the proviso, which appellees claim were within the jurisdiction of the engineer as arbitrator and which we claim

were outside of it, can be given full effect without construing the contract to give him such jurisdiction, it would be most inequitable and contrary to established rules of construction by implication to amplify his discretionary power as arbitrator so as to make it embrace anything beyond the *amount* of additional time which, in his judgment, is just and reasonable.

But it will be said that even if the engineer is not vested with power to allow or refuse time in case of prevention by freshets, etc., still the word "may" is merely permissive and does not give the contractors a *right* to any time.

This argument is equivalent to saying that the ninety-odd words contained in the proviso are not intended to declare the terms of the contract, but merely a possible favor which one party may, if he pleases, grant to the other.

But in truth the word "may" in this proviso means the same as "shall." It is a word which usually expresses a contingency, and is used, according to circumstances, in two different ways and with very different meanings. On the one hand it may express a contingency involving discretionary power; as, for example, if we say, "I may do this;" "I may allow that." Referring here to the positive act of a free agent, it implies discretionary power. But it may express a contingency wholly dissociated from any discretionary power, as if we say, "I may *be* shot;" "I may *be* allowed a respite;" "additional time may *be* allowed them." In such cases the contingency expressed by the word "may" involves a status, or a privilege, and in no-wise refers to any positive act or discretion of any one. But it may be said that the word "allowed" refers not merely to the privilege of the contractors to have an extension, but also to a positive act involving discretion. It is quite true that the word "allowed" may be used in such a

double sense. Thus, if the clause had read "may be allowed (1) *them* (2) *by the engineer*," the word would not only relate to a privilege of the contractors to have the allowance, but also to an act of the engineer in allowing it. But in the clause we are discussing the word "allowed" has no such double significance, for while it does plainly and expressly relate to the contractors having an allowance ("additional time may be allowed *them*"), the contract may directly, by its own force, allow the time as well as indirectly through the engineer, and the word cannot be made to relate to a power of the engineer to allow without interpolating after the words "may be allowed them" the material words "*by the engineer*."

Again, it may be said the words "in writing" indicate that the engineer is invested with the discretionary power to determine whether the contractors have by freshets become entitled to additional time. It is sufficient, we think, to reply that the contract by its own force may as well give them the right to have the allowance in writing as to have it without writing, the requirement of a writing being simply intended to provide better evidence of the amount of additional time which has been fixed as just and reasonable.

But it may be asked, if the additional time is not to be allowed by the engineer by whom is it to be allowed? To answer this question intelligently we must understand precisely what is meant in the question by the word "allowed;" for it has a double meaning. When the contract says, if the contractors are prevented by freshets "additional time may in writing be allowed . . . them," it may be urged that the word "allowed" indicates not merely that they are to *receive* the allowance, but that *some* power is to make it. This is true. But here again we must understand what is meant when it is said, first, that the contractors are to re-

ceive the allowance; and, secondly, that some power is to make the allowance.

Now, when the contract says "additional time may in writing be allowed . . . them" it is evident that the contractors by the allowance are to receive two things—first, the substantial privilege of additional time, and, secondly, a "writing" evidencing that privilege—and when we next come to consider by what power the allowance is to be made, it is important to know whether we are considering the substantial privilege to the contractors, or the mere "writing" evidencing it.

Accordingly, let us first consider what power under this contract makes the allowance of the substantial privilege of additional time. We use the word "power" advisedly, for (aside from the written evidence of it) it is not necessary that any person or party or arbitrator shall allow it. The contract itself, of its own force, may allow additional time and prescribe its amount, or leave it indefinite, or leave it to some person or to several persons to fix. So far, therefore, as concerns the substantial privilege to the contractors of having additional time allowed them, it is not essential to the allowance that the privilege shall be granted or allowed by the engineer, or Chief of Engineers, or any one else, and therefore when the contract says, "*Such* additional time may in writing be allowed *them as* in the judgment of the (engineer) shall be just and reasonable," there is no reason for implying a power in him, which is not expressed in the contract, and making the clause read: "Such additional time may in writing be allowed them *by the engineer* as in the judgment of the (engineer) shall be just and reasonable."

But, as we have seen, the contract not only provides that in the contingency mentioned the contractors may have allowed to them the substantial privilege of additional time, but it also provides that this time "may *in writing* be allowed." Now, writing involves a positive act, and must be

made by some person, and therefore it may be argued for appellants that the words "may *in writing* be allowed them" indicate that the allowance in writing is to be made *by the engineer*.

This, we submit, is a *non sequitur*. If the contingency has arisen upon which the contract gives the contractors the substantial right to an allowance of additional time and requires it to be in writing, then the United States, as the other real party to the contract, is bound to give them that writing by its properly authorized agent or agents. To infer from the mere fact that the additional time is to be "allowed in writing," not only that the engineer in charge is the sole authorized agent of the Government to determine for it whether it will give the writing, and that he alone can give it, but that he is also to determine for the contractors whether they are entitled to the time or the writing, would, we submit, be pure assumption.

In truth, the Government itself never intended to submit to the engineer in charge anything more than the amount of additional time which would be reasonable in case of prevention by freshets. According to our contention, neither party was bound by his judgment as arbitrator, except as to the one subject-matter referred to him by the contract, namely, the amount of time; and as, on the one hand, his judgment that the contractors were not prevented by freshets could not bind them, so his judgment, *as arbitrator*, that they had been so prevented could not bind the Government. If he essayed to determine whether there had been prevention by freshets he did so, not as arbitrator, but as a nominal party to the contract representing the Government. Of course, the Government, through its properly authorized officer, could determine that for itself. Every party to a contract must determine for himself what his contractual obligations are. But we shall see that the engineer in charge was not authorized to determine this even

for the Government without the express approval of the Chief of Engineers.

As he had no power to make the contract without the sanction of the Chief of Engineers (R., p. 15), and since an extension does necessarily alter one important term of the contract—namely, the time of performance—it follows that he could not, as the Government's agent contracting for it, bind it by an extension. That is beyond his power and vests primarily in the Chief of Engineers, whose approval is required as a condition precedent to the taking effect of each and every act on the part of the engineer in charge, excepting only the few very limited powers expressly confided by the contract to him alone.

By the freshet proviso he is made an arbitrator, and as such empowered to do one and only one thing—namely, to decide how much time will be "*such* additional time . . . as, in (his) judgment, shall be just and reasonable." By another clause of the contract his decision "as to *quantity* and *quality* shall be final." Elsewhere he is given general direction of the work. No other independent powers are given him.

Accordingly, when the first extension was "allowed in writing," by what is called the "supplemental contract," it was, it is true, executed by the engineer in charge, as the nominal "party of the first part," and delivered by him to the contractors, but it was made expressly "subject to the approval of the Chief of Engineers," and it was in fact "duly approved by the Secretary of War, the superior of the Chief of Engineers" (Rec., p. 32). Again, when the second and last extension was allowed, the engineer in charge first referred the matter to the Chief of Engineers, with his recommendation that "the interests of the Government will be best served by an extension," and only after "the extension . . . was *granted and approved* by the Chief of Engineers" the engineer in charge, "in writing," notified the other parties that the time for completion was extended.

Again, whilst the contract makes the engineer in charge the active instrument of the Chief of Engineers in *annulling* the contract for failure to begin the work at the agreed time or to prosecute it diligently, it vests the real power of annulment not in him, but in the Chief of Engineers. Although the engineer in charge is, in the first instance, to judge whether the contractors have failed in diligent prosecution of the work, and although he is to give "in writing" the notice of annulment to the contractors, the annulment itself (the taking away of the substantial contract privilege of the contractors to further time for completion of their work) is not confided to the engineer in charge, but derives its whole vitality from "the *sanction* of the Chief of Engineers." In the contingency that the contractors fail in diligent prosecution "in the judgment of the engineer in charge . . . (he) shall have power, *with the sanction of the Chief of Engineers*, to annul this contract by giving notice *in writing*," &c.

To summarize: The practical interpretation of a contract by one of the parties to it, in executing it before any controversy has arisen, is of material assistance in arriving at an understanding of the intent of the parties and of the true meaning of the contract. Further, such a practical interpretation by one party is in the nature of an estoppel to an attempt by such party to subsequently construe the contract, for his benefit, to mean something different from his previous practical interpretation. Now, in this case, as we have seen, on the occasion of each extension or allowance of additional time, the allowance was not by the engineer in charge, but by the Chief of Engineers, or at least by those two officers in conjunction, acting as the proper agents of the United States for the purpose. This procedure by the agents of the appellants would seem to dispose of the contention of counsel for appellants that the question of allowance of additional time was within the sole discretion of

the engineer in charge. We admit that the *amount* of time to be allowed was to be fixed by the engineer in charge, exercising a sound and reasonable discretion—that is to say, if the engineer in charge fixed an amount of additional time not manifestly unjust and unreasonable and amounting to and operating as a constructive fraud on the contractors, his judgment on that point would be final. But as to the broader question of whether or not an extension was to be granted, involving a determination of the question of whether or not the freshets had occurred and had prevented the contractors without their fault (*this determination, be it observed, not being binding on the contractors, but being only such a determination as any party to a contract must make when he considers what he must do in order to perform his contractual obligations*), our contention is that this question was not one resting in the sole discretion of the engineer in the capacity of an arbitrator or referee appointed by the contract, but required for its determination the action of the same power which made the contract—that is to say, the action of the *United States* through its agents (whoever they might be), who were the proper agents for the purpose. And the contract has, before this controversy arose, been construed by the agents of the appellants in just this way, for the several writings evidencing allowances of additional time that were made in behalf of the United States to the contractors were made *not merely by the engineer in charge*, but with the prerequisite authority of the Secretary of War or of the Chief of Engineers, or by those officers and agents of the appellants in conjunction with the engineer in charge. In short, the Government, through its Chief of Engineers (or his superior, the Secretary of War), having determined, *for itself*, that under its contract the contractors were entitled to receive from it "an allowance in writing" of additional time, caused that writing to be executed by the engineer in charge, as its nominal representative "party

of the first part" in the contract, gave that writing validity by the approval of its other agent, who had the real authority to determine, *for it*, whether the writing should be given, and then, through the engineer as the intermediary between it and the contractors, named in the contract, it delivered this writing to the contractors.

It would be no answer to this contention of appellees to say that these extensions were not under the freshet proviso. In the first place, as we have shown, the Government has not entered into a contract under which it has given power to the engineer to bind it in such a material matter as changing the time within which the contract must be performed. Such a change, whether made under the freshet clause or for any other reason, must be made by *the Government* through its agent having power for it to *make* and alter the contract, to wit, the Chief of Engineers. Therefore an extension admittedly under the freshet proviso would require more than the agency of the engineer in charge. In the second place, two extensions of the similar contract for the lower work (containing all of the provisions under discussion here) were applied for *on account of freshets* and were *granted by the Chief of Engineers* (Rec., pp. 40, 41).

There is yet another reason for holding that the freshet proviso did not so far extend the arbitration power of the engineer as to authorize him to decide for the contractors whether freshets and not their own fault prevented the completion of their work at the time agreed upon.

In the first part of the long paragraph containing the freshet proviso there is a provision for the *annulment* of the contract for delay or want of diligence during the original contract period. It reads as follows:

> "If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the

work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the SANCTION of the *Chief of Engineers*, to *annul* this contract by giving notice *in writing* to that effect to the party or parties (or either of them) of the second part," etc.

Finding I, Rec., p. 31.

Now, there are here two grounds of annulment: *First*, delay or failure to *begin* performance; *secondly*, failure "in the judgment of the engineer in charge" to *prosecute* the work diligently.

The first of these grounds of annulment is not left to the arbitrament of the engineer in charge. If the contractors have *in fact* begun the work at the time prescribed in the contract, then the contract cannot be annulled upon the ground that it has not so been begun. Although the engineer may report that it has not been so begun, and even with the approval of the Chief of Engineers attempts to annul the contract, there is no legal annulment. Nor is the second ground of annulment left to the arbitrament of "the engineer in charge," but the real arbitrament is confided to the *Chief of Engineers*, whose "*sanction*" of the annulment is expressly required, notwithstanding the engineer in charge is to perform the sanctioned act and "annul this contract by giving notice in writing to that effect," and notwithstanding the annulment must be preceded by the "judgment of the engineer in charge" that the contractors have failed in diligent prosecution of the work.

Now, two facts are important to be observed in this connection. In the first place, in this opening clause of the paragraph, when the contract *intends* to refer the question of diligence to the engineer's judgment, even provisionally it expressly says so; whereas in the clause in the freshet proviso relating to the contingency of prevention by freshets, it does nothing of the sort. Yet it could as well have done

so there too had it been intended to give him power as arbitrator to decide for both sides whether there was prevention by freshets, etc.

In the second place, it will be noted that in the annulment clause the engineer in charge, who, as representing the United States, is one of the very parties to the contract, who has superintendence and direction of the work, who is responsible for its conduct, who may be subject and sensitive to blame for delays, who may therefore be much too exacting as to speedy performance, and whose legal status is opposed to that of the contractors, is *not* confided with the power to annul the contract for want of diligence and cannot bind the contractors by his judgment that they have failed in diligence, but merely has the right given him to report his judgment to the Chief of Engineers, whose sanction is absolutely required to give that judgment any vital force, and then the engineer in charge is given the mere formal power to give the annulling notice.

According to the contention for the appellants, if during the original contract period the contractors were in fact diligent, and were in fact prevented by freshets from completing the work, and could prove these facts to the satisfaction of the Chief of Engineers or any court, yet if the engineer in charge thinks otherwise, although he could not *annul* the contract (because the contract has not given him jurisdiction to act on his judgment in giving notice of annulment without the previous sanction of the Chief of Engineers), still, upon his erroneous judgment of the identical facts which would not have justified annulment, he can, at the end of the contract period, accomplish the same substantial result by simply refusing "such additional time" as the freshets have not only rendered "just and reasonable," but absolutely essential to the completion of the work. We do not believe this court will resort to implication (as it

must) to give the engineer such a power to bind the other parties with whom he has contracted.

But it might be said that although the Government or the Chief of Engineers in making its contract may not be willing, by the *annulment* clause, to delegate to the engineer in charge the power to *terminate* the contract during the period fixed in it for performance, and thus deprive the contractors of the benefit of the contract, the Government or the Chief of Engineers may be quite willing to delegate to engineers in charge of Government work the power to *extend* the contract. In reply to such a contention it would seem sufficient to say: The addition of time by extension and the subtraction of time by annulment are equally material changes of the same material term of the contract, namely, the time of performance, and so far from the Government being more willing to delegate the power to extend the contract for the benefit of the contractor than to annul it for its own benefit, the presumption is just the other way, for the Government (that is, here the Chief of Engineers) would surely as carefully guard against imprudent extensions by its numerous engineers in charge of Government work to its detriment as against ill-advised terminations of them to the detriment of the other contracting party. The truth is the Chief of Engineers is the real authority in all these matters (subject, of course, to his superior, the Secretary of War), and the various engineers in charge of Government works are merely subordinate intermediaries between him and the contractors, vested in general only with such limited powers as are thought proper to delegate to them to superintend and report upon the work. Counsel for appellants contended that if, in the event of actual prevention by freshets and without fault of their own, the contractors would have the legal right to "additional time . . . such as shall . . . be just and reasonable," then these extensions might be indefinitely repeated to the Government's detriment. The

answer is twofold: First, such repetition of the extension would in each case depend upon prevention by freshets without fault of the contractors, and in that event they *ought* to have just and reasonable extensions; and, secondly, if the contention for appellants (Appellants' Brief, p. 29) be conceded that the engineer in charge is given absolute discretion to make or refuse extensions, it follows that he may, by repeated, though imprudent, extensions, indefinitely bind the Government, to its detriment, and when it ought not to be bound.

Suppose that under the contracts in this case an extension on account of freshets had been granted by the engineer in charge by his individual action, without the approval of the Chief of Engineers, when in fact there were no freshets; that the Chief of Engineers thereupon disregarded such grant of extension and removed the engineer in charge, and proceeded to make new contracts with other contractors for finishing the work, and that the original contractors brought suit against the United States for breach of the extended contract—could it not be argued conclusively by the Government that the engineer in charge had no individual power to make the extension?

Second.

The appellees had the right to the judgment of the engineer as to how much additional time would be just and reasonable and to be allowed that additional time; but he having refused to exercise his judgment or to name any time at all, the further performance of the contract was wrongfully prevented, and the appellees are entitled to damages.

If we are right in our contention that the contract does not make the engineer judge of the question whether the prevention of completion was due to freshets, etc., then it is unnecessary for us to establish either (1) that he rendered no decision, or (2) that his decision was so grossly wrong as

to be constructively fraudulent, or (3) that his decision is reviewable.

But even if it should be held that the engineer was authorized to decide both for the Government and the contractors that they were not so prevented, then we submit, first, that they had a legal right to a *bona fide* decision from him, and, secondly, that if (1) he rendered *no* decision, or (2) rendered only a constructively fraudulent one, his conduct operated as a breach of the contract.

I. The right of the contractors to a *bona fide* decision from the engineer we do not understand to be disputed.

II. In fact the engineer rendered no decision at all. He simply refused to allow any additional time. This is expressly found in finding X (p. 36).

It is therefore needless to inquire whether (as we think we have shown in our former brief), even if his non-action could be taken to have amounted to an adverse decision, it was so grossly contrary to the established facts shown in the findings as to amount to constructive fraud on his part and plain spoliation (Crane Elevator Co. *vs.* Clark, 80 Fed. Rep., 705).

On the former argument we were asked whether this finding by the Court of Claims that the engineer had failed to render any decision might not be a conclusion of law. We think not. Whether the contractors were *entitled* to his decision is a question of law, but we submit that whether he decided—whether he *in fact* decided—is purely a question of fact. The mental state, the words and the acts of an arbitrator, it seems to us, are as purely facts as any conceivable, however intangible they may be. Whether he has rendered a decision may, logically, be the subject of proof—by a writing, if such has been given; by his words, if he used any, to indicate it; by his conduct, which may show it. And that he did

not render such a decision may logically be proven by similar testimony. If in particular cases the law, for reasons of its own, will not admit such proofs, its rejection of the proofs cannot change the essential nature of the question to which the proofs are addressed, and cannot convert it from a question of fact into a question of law, nor change the conclusion upon that question from a conclusion of fact into a conclusion of law.

And if the finding that the engineer did not in fact render a decision is not a conclusion of law, but a conclusion of fact, then the evidence upon which the finding was grounded by the Court of Claims is not material to be inquired into here. What that evidence was this court does not know, and if it were in the record it would not be considered.

Third.

The freshet proviso was never abrogated or exhausted of force by the first extension of the period for completion of the work, as contended by counsel for appellants, but remained a vital part of the contract as extended.

The first proposition of the brief of counsel for appellants is the following:

> "The appellees were only entitled as of right under the contract to an extension of time for the commencement or completion of the work described, in the event that they were prevented from commencing or completing said work by reason of ice, freshets, or the force and violence of the elements, *within the periods mentioned in the original contract;* and if not so prevented during *that* period, there is no such right given to them in the future, unless again contracted for, although the time for completion was thereafter extended as a matter of grace."

They base this contention upon the last clause of the freshet proviso, which is as follows:

> "But such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon."

They claim that "*such* allowance" (they underscore "such") refers to one and only one allowance, namely, the first allowance at the end of the original contract period, and that that one allowance exhausted the privilege of extension. They say:

> "The last clause of the contract providing that such extensions should not impair the obligations of the contract, but should subsist and take effect as though it was the date originally agreed upon . . . refers only to such extension or change in dates as is mentioned in the preceding sentences, to wit, such additional time as the engineer might grant them because of their having been prevented from commencing or completing the work during the periods mentioned in the original contract. . . . Not having been so prevented during *such* time, and no *such* extension having been granted, this clause, of course, has no continuing effect. It is at an end. It cannot be revived except by a new contractual stipulation of like import. This was never expressly done."

We fail to perceive force in this contention. To say that all "the rights and obligations of the parties" shall, during the first period of extension, remain precisely as if the new date for completion had been the date originally agreed, is one thing. To say that when the first extension has been made all the rights and obligations of the parties shall remain except that one right and one obligation, namely, the right of the contractors to additional time in the event of prevention by freshets and the obligation of the other party

to recognize it, shall be dropped out of the contract, is quite another thing. Counsel on both sides agree that the freshet proviso, in case of prevention by freshets, does change the *date* of completion, does extend it. The clause in question does expressly also extend "the rights and obligations of the parties under this contract." Amongst the material "rights and obligations of the parties under this contract" is the very material one relating to extension in case of prevention by freshets. It is not expressly excepted from the operation of the clause providing generally that the rights and obligations are to remain in force. To resort to implication and say that this protective-freshet clause is not to continue in force notwithstanding the contract without exception expressly says the rights and obligations of the parties "*shall* subsist," etc., would, we submit, be entirely unwarranted by the language or intent of the proviso and would at once contravene important rules of construction and bring about a manifest injustice, for the result would be that, although the contractor be induced (as the appellees were here) to make large investment on the faith of an extension, yet, although the extension by act of God proves valueless, they are utterly without remedy. Such a result should surely make any court pause. On the other hand, we submit that the effect of the first extension was to change the time and only the time of completion; that it left all the other "rights and obligations of the parties" as if the new date had been the one originally named; that the same was true of any subsequent extension, and that amongst these rights and obligations there were none more important than those secured by the freshet proviso, and none which should be more liberally construed in favor of the contractors.

But it may be said that when an extension was granted under the freshet proviso the extended *date* is to be considered "precisely as if the new date for such commencement or completion had been the date originally agreed

upon," and the right to further extension would therefore depend upon whether the contractors had been prevented by freshets, without fault of their own, at *any time* (whether during the extension or during the original contract period), and such faults, even prior to the extension, would prevent their right to a further extension, and the extension therefore could not operate as a waiver of faults during the original period or any prior extension. This proposition, we think, is fatally defective for two reasons. In the first place, it is based upon a totally erroneous reading of the language of the contract. The contract does not say that the extended *date* is to be considered "precisely as if the new date . . . had been the date originally agreed upon," but that the "*rights and obligations* of the parties under this contract" "shall subsist, take effect, and be enforceable precisely as if the new date . . . had been the date originally agreed upon." In other words, whilst the date is extended, the terms of the instrument remain in full force. (Let it be observed that we are discussing now the meaning of the freshet clause in the original contract prior to any extension.)

Now, we contend that the very first extension of the contract necessarily operated as a waiver of any previous fault of the contractors occurring during the original contract period, and that such waiver did not alter or affect the *terms* of the instrument nor the rights and obligations of the parties under them, but merely concerned the *performance* of those terms. Performance is not a part of the contract, but is the doing by one party of the thing contracted to be done. A contract never determines whether the thing to be done has been done so as to conform to its requirements, but merely prescribes the thing to be done, and thus gives the parties and the courts the basis upon which to judge whether the performance conforms to the contract terms. Nor does an acceptance of work which does not in reality conform to the terms of a contract alter those terms.

A waiver of exact performance does not alter or abandon the contract. It does not destroy its terms.

We submit that when the first extension was made it necessarily involved an acceptance of the work up to that time—in other words, waived any default of the contractors during the original term of the contract. To hold otherwise would be to invalidate every one of the extensions under both contracts and to put it into the power of one party to a contract to induce large outlays of time, money, and labor by the other, with the sole effect of spoliation; and all this by a refinement of reasoning which does not belong to this age.

In the next place, the proposition is fatally defective because the last extensions in both cases were made with very material alterations of the terms of the contracts. In the case of the "upper work," instead of a minimum of 150 men, 300 were required; a new incline, 90 cars, 10 steam drills, and force and plant sufficient to remove 640 cubic yards per day. The Chief of Engineers granted and approved the extension on these terms. The extension modifying the contract in these material particulars constituted a new contract, wherein every provision of the original contract consistent with the modifications and including the entire freshet proviso remained in full force. Thus the contract itself, for the period of the last extension (1888), *expressly provided* that in case the appellees were prevented *that year*, by freshets and not their own fault, from completing the work, they should have the benefit of the freshet proviso.

Fourth.

The Damages Awarded by the Court of Claims were Properly Awarded.

Counsel for appellants contend that the facts found by the Court of Claims are not sufficient to support its judgment, because the profits, the loss of which that court finds resulted from the appellants' breach of the contract, were uncertain and remote. In support of this argument they say there is no determination of the amount of time that would have been just and reasonable, nor that the plaintiffs could and would have completed the work within such just and reasonable time, nor that "in the future the same industrial and climatic conditions and the same relations of supply and demand would obtain as in the past," nor that the appellees sought and failed to obtain other employment for themselves, their plant, and their capital after the breach of the contract. They then argue in much detail the impossibility of ascertaining with absolute precision how much time would have been "just and reasonable," or exactly how long it would have taken the contractors to finish the work, or exactly what the industrial and climatic conditions might have been during this extended time, or how much the market price of the broken rock might have varied from day to day, and so on. We believe that both upon principle and under the decisions of this court, which we will presently refer to, this objection to the judgment is entirely fallacious. In the first place, the objection that the lower court has not found as a fact "the amount of time that would have been a just and reasonable extension" is based upon the assumption that when the engineer failed to allow such "just and reasonable" time, it became the duty of the Court of Claims to do so, whereas, in truth, since the appellees are not suing for additional time within which to complete the work, there

is no need for a finding as to how much time would be just and reasonable. It may be true that the Court of Claims, in estimating the profits as a jury would do, would consider how much time would be required to complete the work, just as it would consider a vast number of other details of evidence in estimating the loss of the appellees; but in the language of this court in the case of United States *vs.* Smith (4 Otto, 914):

> "We know of no rule of law or practice which requires a court or jury to itemize the elements of the calculation by which it arrived at its final result. In this case the court was not asked to say whether it included this or that supposed element of compensation in its judgment."

As to the objection that the Court of Claims does not find that the appellees could and would have completed these works within a reasonable time, we think it is likewise sufficient to reply that since the contractors are not asking for such additional time to complete the work, it is not a subject of inquiry whether they could or could not have completed it within a particular time. We may assume that the moment it became known that they would not be allowed to complete their contract and avail themselves of their large investment made upon the faith of it, their credit was so far impaired that they could not carry on the work at all, and yet the injury done by the breach of the contract is none the less, but all the more certain.

Certainly it is to be presumed that an existing profitable contract would be taken advantage of by the contractors, and that it was a profitable contract is shown beyond dispute by the findings of the court below.

As to the objection that in order to sustain a judgment for profits "it is necessary to have found that in the future the same industrial and climatic conditions and the same relations of supply and demand would obtain as in the

past," such a proposition would prevent the recovery of profits in every case based upon the breach of an uncompleted contract.

The fact is established (Finding XV, p. 37) that for this rock, at the place where it was situated—the city of Louisville—there was a "ready market for it at a specific price, $1.25 per yard." The market price at the nearest market controls in estimating the value of a commodity to ascertain profits (Grand Tower Co. *vs.* Phillips, 23 Wall., 479, 480).

As to the objection that the findings do not show that the appellees sought for and obtained other employment for themselves, their plant, and their capital, it seems sufficient to answer that this is not a case where the plaintiffs sue for the value of rejected services contracted for, but sue for the net value of rock which by the contract was to become their property and which has been taken away from them.

If a farmer, with a three-horse wagon, engages a blacksmith to overhaul his wagon and put it in complete order, and agrees in payment to give him the lead horse, and then after the work is nearly done drives off with his wagon and full team, when the blacksmith sues to recover the value of the horse, less the reasonable cost of completing his work upon the wagon, according to the contention of counsel the farmer may escape payment by saying it is impossible to tell exactly how long it would take the blacksmith to complete his work or what is the value of the iron or wood or canvas required to complete it, for the markets for all of these materials may vary greatly from day to day. He might also maintain that the climatic conditions may materially delay the blacksmith in obtaining the materials and labor necessary to complete the work; that the value of the horse is a thing about which men may differ, and, lastly, that the blacksmith must show that he could not find other jobs which would remunerate him partially, perhaps completely, and possibly more fully than the one which has been taken away from him. We submit that the cases are parallel, and we submit

further that it is the every-day practice of *nisi prius* courts to award damages notwithstanding such critical objections.

Counsel for appellants say:

> "The grounds upon which the general rule of excluding profits, in estimating damages, rests, are (1) that in the greater number of cases such expected profits are too dependent upon numerous, uncertain, and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote, and not, as a matter of course, the direct and immediate result of the non-fulfillment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms."

This is the language used by Mr. Justice Lamar in the case of Howard *vs.* Stillwell, 11 Supreme Court Reporter, 503 (139 U. S., 169), and, as far as it goes, is to us an entirely satisfactory statement of the law. But it will be noted that it is followed in the opinion by this pertinent qualification:

> "But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself or the special circumstances under which it was made it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into."

The court then proceeds to comment upon and approve the leading case of Hadley *vs.* Baxendale, 9 Exch., 341, which it says "has been cited with approval and commented on by many of the courts of this country and by text-writers

as well. The general principles of it, we believe, are recognized and enforced in most, if not all, of the several States." In that case the plaintiffs were owners of a flour mill and sued a machinist for loss of profits due to delay in supplying machinery, and it was held:

> "The proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—*i. e.*, according to the usual course of things from such breach of contract itself—or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. . . . It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants."

In another flour-mill machinery case (Pennypacker *vs.* Jones, 106 Pa. St., 237, 242) Mr. Justice Green used this language:

> "It was no part of this contract that the plaintiffs should make profits, or even have the opportunity of

> doing so, by carrying on a business with the machinery which the defendants agreed to erect. It is not like the sale of chattels or of land, where the difference between the contract value and the actual or market value of the property sold represents directly and immediately the measure of the party's loss or gain in the transaction. There the possible profit is the very object of the contract, and is necessarily in the contemplation of the parties. But when a machinist furnishes machinery to a mill-owner it is no part of his engagement that a profitable business shall be carried on with the machinery furnished."

In the three cases cited damages were refused, but the rule laid down in all of them is applicable to the case at bar, and we think makes certain the right of the appellees to the damages adjudged. In this case, not only are the profits not remote, but their loss is "as a matter of course, the direct and immediate result of the non-fulfillment of the contract," and they are "a part of the contract itself and can be implied from its nature and terms." If this be true, it brings the profits in the present case within the very language of Mr. Justice Lamar, quoted by counsel for appellants.

Again (still quoting his language in Howard *vs.* Stillwell), in this case it is plainly true that "the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are . . . within the intent and mutual understanding of both parties at the time it was entered into." Indeed, they form the express consideration of the contract, and therefore must be held to have been within the intention of the parties. The rock was to be the property of the contractors. It was a fact, and it was presumably a known fact, that the cost of excavating and removing the rock was greater than the 85 cents per yard to be paid to them, and the whole beneficial consideration—the whole profit—causing the appellees to enter into the contract was the value of the rock over and above the cost of

production. We cannot conceive a case in which profits are more distinctly "a part and parcel of the contract itself" or "within the intent and mutual understanding of both parties at the time it was entered into."

In the mill machinery cases, as Judge Green said:

> "It was no part of the contract that the plaintiffs should make profits, or even have the opportunity of doing so, by carrying on a business with the machinery which the defendants agreed to erect."

When they agreed to erect the machinery they did not know whether the plaintiffs were doing a profitable business or not; they did not know whether they would continue in business or not; there was no engagement on the part of the plaintiffs to do either of these things. But in the case at bar the appellees, in substance, contracted for a profit—that is, they contracted for this rock, and therefore *contracted for its value;* and if, as the events proved, its value exceeded the total cost of handling it they may be fairly said to have directly contracted for that profit.

The case of Anvil Mining Co. *vs.* Humble (153 U. S., 540) is strikingly like the one at bar. In that case the contractors agreed with the mining company to mine certain levels of iron ore in the company's mine, and were to receive 60 cents per ton. It was provided that the company should have the right to terminate the contract at any time it should decide that the system of mining was "prejudicial to the future welfare and development of the mine." The company wrongfully stopped the work, and the plaintiffs sued for the profits which they would have made had they been allowed to complete the work according to their contract. After stating the fact (and it was a fact and not a conclusion of law we think that the court meant) that the company never "made such determination," Mr. Justice Brewer, in delivering the opinion of the court, continues:

> "A third proposition of defendant is that 'under the facts in this case the damages claimed for loss of profits

were too uncertain, contingent, and conjectural to found a verdict upon. Profits which are a mere matter of speculation cannot be made the basis of recovery in suits for breach of contract, while profits which are reasonably certain may be. As said by Mr. Justice Lamar, in Howard *vs.* Manufacturing Co., 139 U. S., 199, 206; 11 Sup. Ct., 500: 'But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.' See, also, Cincinnati Siemens-Lungren Gas Illuminating Co. *vs.* Western Siemens-Lungren Co., 152 U. S., 200; 14 Sup. Ct., 523.

"Now, there was in this case testimony to show the cost of mining each ton of ore, and also the amount of ore remaining in the first level of the mine at the time the work stopped. From these figures the profit which would have been made by the plaintiffs if they had completed the work of mining all the ore on the first level is a mere matter of multiplication. It is true that the cost of mining the remaining ore might differ from that of mining the ore which had already been taken out; but still proof of the cost of taking out that which had been mined, and of the condition of the mine as it was left, furnished a basis upon which a reasonable estimate could be made as to the cost of extracting the remaining ore. Equally true is it that there was not mathematical certainty as to the amount of ore remaining in the mine; yet both plaintiffs and defendant furnished testimony as to such amount, and testimony which, while not such as to put it beyond doubt, was sufficient to enable the jury to make a fair and reasonable finding in respect thereto. The case is one, therefore, in which the profits are not open to the objection of uncertainty, and certainly not to that of remoteness, for they would have been the direct result of carrying on the contract to a completion, and were obviously within the intent

and mutual understanding of both parties at the time it was entered into."

We submit that this authority settles the law of this case. In that case the amount of ore to be excavated was uncertain. In this case the amount of rock was ascertained to a mathematical certainty. In that case the cost of mining each ton of ore was not certain in the sense contended by counsel for appellants to be necessary. The same is true here. Yet this court held that testimony showing such cost and amount was sufficient. Such testimony must have been before the Court of Claims in this case, for we have their positive findings. It was true there also that the cost of mining one ton of ore might differ from the cost of mining another, but the cost of taking out what had been mined and the known condition of the works furnished a basis for a reasonable estimate which the court considered sufficient to go to the jury, and so says the court, "The profits are not open to the objection of uncertainty." The same is true in this case. Again, in that case the very consideration of the contract was that the plaintiffs should have the natural profit to be yielded by the payment of thirty cents per ton, while in the present case the consideration of the contract was that the plaintiffs should have the value of the rock to be excavated; and as in that case it was held, so we submit that in this case it must be held, that "the profits are not open to the objection of remoteness, for they would have been the direct result of carrying on the contract to a completion, and were obviously within the intent and mutual understanding of both parties at the time it was entered into."

As to the questions of reasonable certainty of the contractors finishing the work if they had had just and reasonable additional time, of industrial conditions, of climatic conditions, of supply and demand, of an established market price, and, in brief, of the reasonable certainty of the con-

tractors making the profits claimed if they had been permitted to complete the work, we further submit that the positive findings of the Court of Claims conclude all of these questions and make it unnecessary and contrary to precedent that they be again inquired into in this honorable court. Indeed, it is impossible to make such inquiry in the absence of all the evidence which the Court of Claims had before it (United States *vs.* Smith, 4 Otto, 914; United States *vs.* New York Indians, 173 U. S., 464, 470).

Suppose that the Court of Claims had before it evidence that the contractors actually sold large quantities of the rock excavated, which was their property under this contract, and also had evidence as to what was the market price? They must, on such evidence, obviously have considered the profits as immediate and not remote, and their positive findings as to what would have been the contractors' profits, except for the breach by the other party to the contract, necessarily followed. But the court below was not required to include such evidence in their findings (United States *vs.* New York Indians, 173 U. S., especially page 470; Rule I of Supreme Court relating to appeals from Court of Claims). That an appeal from the Court of Claims does not bring up the whole record is a statutory regulation (R. S., § 708, and pursuant regulations by the Supreme Court, 3 Wall., vii; 17 Wall., xvii), and when this regulation provides for a finding of the facts and a certification of such finding, without the evidence, to the Supreme Court, it is a legal and statutory presumption that such finding is based on reasonably sufficient evidence and is conclusive as to the evidence and facts in this court. The findings of the Court of Claims are like the verdict of a jury and will not be disturbed. Its findings are more conclusive than a verdict in this respect, that while a verdict may be accompanied to the court of error by a transcript of the material part of the evidence, the findings of the Court of Claims are unaccompanied by and are conclusive as to the evidence.

In conclusion, we suggest to your Honors' consideration this general statement: That the most manifest and important protection which the contractors would naturally seek, and the Government in fairness would grant, in a contract for rock excavation in the bottom of the Ohio river ("at the falls of the Ohio") would be a clause giving them the substantial right to reasonable further time to complete their work and recoup their loss in preparation for it, if in truth they should, without fault of their own and by the act of God, be prevented from completing it; that this protection was just as essential during any extended period of time given them for completion, and upon the faith of which their investment is continued or increased, as for the original contract period; that such a clause, aside from the consideration that it was in a contract prepared and furnished by the other party, should be liberally construed to give the contractors the fullest substantial protection in case of such prevention by act of God without their fault; that the proviso could do no harm to the Government and was vital to the contractors; that the contract does not in language refer the question whether such prevention by act of God took place to the engineer in charge or any one else to decide for the contractors without interpolating the words "by the engineer;" that such an interpolation would utterly destroy the right of the contractors to protection against ruin by act of God and no fault of their own, and, finally, that this court will not by such implication bring about such a result.

We refer to our original brief for the discussion of such points as are not discussed in this, and respectfully submit that both the findings and the conclusions of the Court of Claims should be undisturbed, and that the judgment should stand.

TEMPLE BODLEY,
H. N. LOW,
Counsel for the Appellees.

JOHN G. SIMRALL, *Of Counsel.*

Supreme Court

October Term, 1888.

No. 42.

THE UNITED STATES, Appellants,

vs.

JOHN R. GLEASON and GEORGE W. GOSNELL, Appellees.

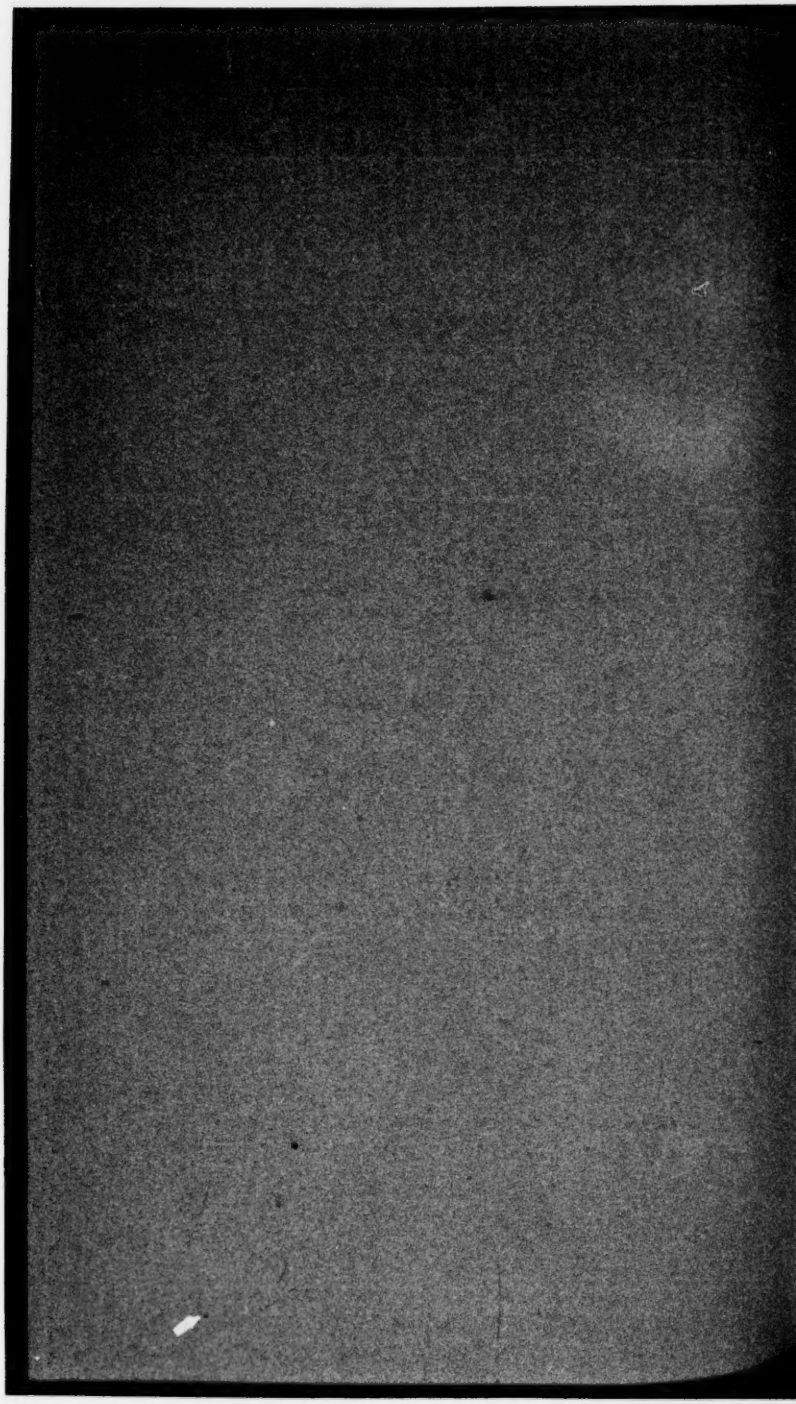
APPEAL FROM THE COURT OF CLAIMS.

APPELLEES' PETITION FOR REHEARING, AND BRIEF IN SUPPORT OF PETITION.

Phillips Bradley,
H. H. Low,
Counsel for Appellees.

Francis H. Stephens,
Of Counsel.

Judd & Detweiler, Printers, Washington, D. C. 88-1900



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 59.

THE UNITED STATES, APPELLANTS,

vs.

JOHN R. GLEASON AND GEORGE W. GOSNELL, APPELLEES.

APPEAL FROM THE COURT OF CLAIMS.

Appellees' Petition for Rehearing under Rule 30 of this Court.

Now come the appellees, John R. Gleason and George W. Gosnell, and by their counsel petition for a rehearing of this cause before this court and say:

This suit arose in the Court of Claims for breach of two contracts by the United States, and was determined in that court in your petitioners' favor, the Court of Claims finding unanimously that the contracts were broken by the appellants, and that your petitioners' damages are (in the two

cases) $63,365 for loss of profits and $5,412.99 retained percentage. Appeal to this court was taken by the defendants below, and the case was submitted, after argument, on October 24, 1899. This court on November 6, 1899, ordered the case for reargument, which was had December 7, 1899. On January 8 an opinion was delivered affirming the judgment of the Court of Claims as to the retained percentage and reversing it as to the other items of damage. From this opinion Justices Harlan, Brown, and White dissented.

That a rehearing of the case is essential to the ends of justice, in that the opinion of this court as to certain material questions involving your petitioners' rights would be modified or changed upon further consideration, and particularly in view of the matters hereinafter set forth.

The grounds of this petition are—

1. That this court misapprehended the true meaning of the twenty-first finding of the Court of Claims.

The Court of Claims made the following finding of fact, among others:

> "No judgment or decision was given by said engineer on the question as to whether the claimants were prevented by freshets and force and violence of the elements during the season of 1888 from completing the work agreed upon within the period limited by the last extension of the contract, nor did he find or decide that the claimants were not so prevented" (Findings X, XXI).

The opinion of this court contains the following as to the meaning of the contracts in respect of the engineer's judgment:

> The contractors "were to be relieved from their contract obligation to complete the work within the time limited, only if, in the judgment of the engineer in charge, their failure so to do was occasioned by freshets or other force of the elements, and by no fault of their own."

> "The parties *agreed* that if the contractors should fail to complete their contract within the time stipulated, they *should have the benefit* of the judgment of the engineer as to whether such failure was the result of their own fault or of forces beyond their control, and, in the latter event, of his judgment as to what extension of time would be just and reasonable."

Now, while this court has construed the contracts to contain an agreement between the parties that the contractors *should have* a certain *benefit*, namely, that of the engineer's judgment whether the contractors were prevented by freshets without fault of their own, the above-quoted finding of the Court of Claims states, as a fact, that the contractors did *not have* this benefit.

The withholding of this benefit contracted for clearly constitutes a breach of the contracts, as construed by this court, if the finding of the Court of Claims, that no judgment was given by the engineer on the question of freshets, is correct—that is to say, if the finding has the real meaning which it has plainly upon its face.

In the opinion of this court, however, the finding is treated as follows:

> "The court below does indeed say, in the twenty-first finding, that 'no judgment or decision was given by said engineer on the question whether the claimants were prevented by freshets and force and violence of the elements during the season of 1888 from completing the work agreed upon within the period limited by the last extension of the contract, nor did he find or decide that the claimants were not so prevented.' But, as it was expressly alleged in the petition, and was found by the court, that, on an application for a further extension because of interruption occasioned by force of elements and not by any fault of the plaintiffs, the engineer did refuse to extend, the statement of the court must mean either that it was necessary for the engineer, in order to give efficacy

to his decision to declare in terms that it was based on a finding of fault on the part of the contractors, or that the conclusion of the engineer did not amount to a decision or judgment, within the meaning of the contract, because the court reached a different conclusion.

"These are propositions of law and not of fact, and we cannot assent to either of them."

Your petitioners admit, if the said finding of the Court of Claims can have only the two alternative meanings last above stated, that the finding is in the nature of an inference or conclusion of law and may be disregarded by this court; but your petitioners respectfully urge that said finding may have another meaning and may literally and exactly state a fact. The evidence below upon which said finding was based may have shown to the Court of Claims that the engineer *in terms and knowingly and intentionally refused to consider* the question of freshets or the question of the contractors' right to his judgment as an arbitrator or referee between the parties, and, from a mistaken idea of his duty, expressly repudiated the idea that he had under the contracts any such function as that of an arbitrator whose decision upon the question of prevention by freshets was, by the contracts, made final between the parties.

If he thus expressly refused to give the contractors what he was bound under the contracts to do, namely, the benefit of his decision upon the questions mentioned, it was a breach of the contracts, and the Court of Claims in making their twenty-first finding have correctly stated *a fact*, and if this finding be a statement of fact your petitioners submit that it must, under section 708 of the Revised Statutes and pursuant regulations by this court (3rd Wall., vii; 17 Wall., xvii), be binding upon this court and be taken to establish such fact.

Your petitioners submit that if said finding can have the meaning that the engineer did not pass upon the question

of freshets at all, either in terms or by implication, and if this possible meaning agrees literally with the finding, *such* literally agreeing meaning should be accepted to establish as a fact that the engineer did not make the decision contracted for; and it involved material error absolutely fatal to your petitioners' rights and resulting in great injustice and pecuniary loss to them to disregard and depart from the finding upon the theory that it "must mean" and could only mean the two alternative things above quoted from your honors' opinion.

This court does not care for the reasons or evidence which led the Court of Claims to make this finding, but in order to illustrate our suggestion that the finding may have, besides the two meanings stated by your honors, the third meaning above stated by your petitioners, your petitioners have attached to this, their petition, a duly certified copy of *all* the evidence in this case which was before the Court of Claims upon final hearing as to what was said and done on the occasion of the said engineer's refusal to extend your petitioners' time for completing the contracts. This evidence is printed below and is as follows:

COURT OF CLAIMS.

JOHN R. GLEASON and GEORGE W. GOSNELL
vs.
THE UNITED STATES.
} Nos. 17782 and 17783.

EVIDENCE FOR CLAIMANTS.

INDEX.

Case 17782.

Depositions of * * * Temple Bodley and John G. Simrall, taken pursuant to the annexed commission on the substituted interrogatories thereto attached, before me, Alonzo Walker, special commissioner and a notary public in and for Jefferson county and State of Kentucky, on the 17th day of June, 1895, at the office of Walker, Christey & Avey, in the Louisville Trust Company building, in Louisville, Ky., to be read in evidence in behalf of the claimants at the trial of said case.

* * * * * * *

TEMPLE BODLEY, being first duly sworn by me, in answer to the annexed interrogatories saith:

1 Interrogatory. State your name, age, residence, and occupation; whether you have any interest in this suit or claim; whether you are related by blood or marriage with the plaintiffs or either of them, and whether you have any suit or claim against the United States.

Answer. My name is Temple Bodley; age, 42; residence, Louisville, Ky.; occupation, lawyer; I have no interest in this suit or claim; am not related by blood or marriage with either of the plaintiffs, and have no suit or claim pending against the United States. I have been and am counsel for the plaintiffs, and have been their legal adviser for many years past.

2 Interrogatory. Do you know the plaintiffs and the work of excavation which they prosecuted in the bed of the Ohio river, opposite Louisville, in the years 1886, 1887, and

1888? Have you ever acted as their counsel; and, if yea, for what purpose?

Answer. I do; and have acted as their counsel.

3 Interrogatory. Whether, prior to December 31, 1888, in behalf of the said Gleason & Gosnell, you requested Major Stickney, the United States engineer in charge of the work, to extend the time for completing the work; and, if yea, for what purpose or upon what grounds you made such request, and did he take any action upon such request?

Answer. In the latter part of the year 1888 the plaintiffs came to me and my partner, Judge Simrall, and requested us to see Major Stickney, who was then the engineer in charge for the United States Government of the work of enlarging the canal basin mentioned in the pleadings in this case, for the purpose of securing an extension of time under their contract for that enlargement. Judge Simrall and I went to see Major Stickney, and we represented to him the difficulties which the plaintiffs had met in the performance of their contract, and the impossibility of their completing the work of enlargement in accordance with the contract, and within the time which (with extensions) had been allowed them, namely, up to the 31st day of December, 1888. We were endeavoring to show him that it was utterly impracticable by reason of the floods or freshets in the Ohio river, and the inundation of the place where the work was to be carried on, for the plaintiffs to carry on the work or to complete it in the time allowed, and specially asked him to grant them an extension in accordance with that part of their written contract with the Government (which, or a copy of which, is filed in this case, marked Exhibit A, with the plaintiffs' petition), and in view of these facts, and many others which we cited to the same effect, we urged upon him that it was his right and duty to exercise a fair judgment upon the question, whether the plaintiffs were or not entitled to a reasonable extension of the time to complete the work under their contract, when he interrupted us and remarked that he had nothing to do with deciding any such question between the Government and the plaintiffs; that he did not occupy the position of a judge or arbitrator; that he had nothing to do with the question whether justice or fair dealing required an extension of time for the plaintiffs to complete the work under their contract, but that it was his business only to look after

the interests of the United States Government in the work, and that because he considered it would be to the interest of the Government to refuse to grant plaintiffs an extension of time to complete their work, he did then refuse to extend that time. I read to Major Stickney that part of the contract before referred to, which provided that "if the party or parties of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented, either from commencing or completing the work, or delivering the materials, at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion, as in the judgment of the party of the first part, or his successor, shall be just and reasonable," etc. And I earnestly urged that it was the plain intention of this contract, and his duty if (as he did not deny) the freshets and violence of the flooded river plainly made it impossible for the plaintiffs to complete their work under the contract within the time which had been allowed them (namely, to the end of the year 1888), to grant them "such additional time * * * for such completion as in (his) judgment shall be just and reasonable." He did not deny that the freshets had prevented the completion of the work, and made it impossible for the plaintiffs, or any one, to complete it within the time allowed them, but he answered summarily that he was not going to do anything but look after the interests of the United States Government alone; that he considered that those interests would be better subserved by taking away the contract from the plaintiffs and not allowing them more time, and having the Government do the work itself; that he had nothing to do with any question of justice between the Government and plaintiffs, and therefore he refused to give any extension of time whatever. I will add that Major Stickney said that in some particulars, which he mentioned, plaintiffs had not done all that they agreed to do, and further, that it is, of course, impossible for me to remember his exact language, but there can be no doubt that I have stated the substance of what occurred and was said. Both Judge Simrall and I felt keenly the injustice of Major Stickney's position in reference to determining whether an extension was just or reasonable, but finding that reasoning was useless, we left him. This is about all that occurred. We told Major Stickney, and, of

course, he understood that we were acting as counsel for the plaintiffs in asking for the extension of time.

4 Interrogatory. If he acted upon such request for extension, whether at the time of such action you had any conversation with Major Stickney touching such extension, and if yea, what was his conversation, or what statement or declaration did he make relating to such extension, or to his action upon your request?

Answer. My answer to this interrogatory is fully set forth in my answer to interrogatory 3.

5 Interrogatory. If he acted upon such request for extension, whether at the time of such action you had any conversation with Major Stickney touching his powers and duties under the said contract; and if yea, what statement or declaration did he make relating to his powers or duties under the said contract with reference to his action upon a request for an extension of time for completing the work?

Answer. My answer to this interrogatory is fully set forth in my answer to interrogatory 3.

6 Interrogatory. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer as if you had been particularly interrogated thereunto.

Answer. I do not know of any other matter or thing, and cannot say anything touching any of the matters in question in this cause that may tend to the benefit or advantage of the plaintiffs or defendant in this cause besides what I have answered.

TEMPLE BODLEY.

JOHN G. SIMRALL, being first duly sworn by me, in answer to the annexed interrogatories saith:

1 Interrogatory. State your name, age, residence, and occupation; whether you have any interest in this suit or claim; whether you are related by blood or marriage with the plaintiffs, or either of them; and whether you have any suit or claim pending against the United States.

Answer. My name is John G. Simrall; residence, Louisville, Ky.; occupation, lawyer; age, 55; I have no interest

in this suit or claim; am not related to either of the parties, and have no suit or claim pending against the United States.

2 Interrogatory. Do you know the plaintiffs and the work of excavation which they prosecuted in the bed of the Ohio river opposite Louisville, in the years 1886, 1887, and 1888; have you ever acted as their counsel, and if yea, for what purpose?

Answer. Yes.

3 Interrogatory. Whether, prior to December 31, 1888, in behalf of the said Gleason & Gosnell, you requested Major Stickney, the United States engineer in charge of the work, to extend the time for completing the work; and if yea, for what reason or upon what grounds you made such request; and did he take any action upon such request?

Answer. I had several interviews with Major Stickney during the latter part of December, 1888, and January, 1889, as to granting the extension on the ground that the completion of the contracts in the time provided had been made impossible by overflows of the works, and sudden freshets, and acts of God, over which Gleason & Gosnell had not and could not have any control. He maintained that under the contract he had a right to cancel it, it mattered not what obstructions prevented the completion of the work in the time specified; that it was a matter entirely in his discretion. We urged upon him that his position, under the terms of the contract, was that of an umpire, or arbitrator, or judge, between the Government and the contractors, and that the fact was indisputable that the delay had been occasioned by the act of God, without the fault of the contractors, and it was his duty to grant the extension. He treated the idea that he was to act as an umpire, or arbitrator, or judge as absurd. He said that he was acting solely as the agent of the Government, and the contractors had to look out for themselves. He said the contract provided that he might do it, but that was a discretion which he would exercise only for the benefit of the Government. I told him that I had, as judge of the law and equity court, had considerable experience in construing contracts, and that I understood the courts to hold that the word "may," as used in this contract, will be construed to mean "must," and that really under the proof in this case (that the delay was occasioned by the act of God) that he had no discretion in the matter, but was bound as a matter of law to grant the

extension. He told me that this was a Government matter, which he understood better than I did. I then appealed to him as a matter of justice, and said that this was a great Government, and could not afford to confiscate and take over $100,000 of private property for public use without compensation and bankrupt two of her good citizens. He said he had nothing to do with that; that they could have their redress through the courts. He said further that he had always thought that such work could be done better by the Government than through the agency of contractors, and that he now had an opportunity to take charge of this work and do it himself for the Government by employing such force from time to time as was needed, and he intended to do it. He said it was his duty to consider the interests of the Government alone.

4 Interrogatory. If he acted upon such request for extension, whether at the time of such action you had any conversation with Major Stickney touching such extension; and, if yea, what was his conversation or what statement or declaration did he make relating to such extension or to his action upon your request?

Answer. He did, and I had conversations with him touching such extension, as fully set out in my answer to interrogatory No. 3, which is made a part of the answer to this interrogatory.

5 Interrogatory. If he acted upon such request for extension, whether at the time of such action you had any conversation with Major Stickney touching his powers and duties under the said contract; and, if yea, what statement or declaration did he make relating to his powers or duties under the said contract with reference to his action upon a request for an extension of time for completing the work.

Answer. He did, and I had conversations with him same as stated in answer to interrogatory No. 3.

6 Interrogatory. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer as if you had been particularly interrogated thereunto.

Answer. I know of nothing else touching the matters in

question in this cause that may tend to the benefit of either party except what I have stated.

JOHN G. SIMRALL.

COURT OF CLAIMS.

I certify that the foregoing printed pages, numbered from one to six, inclusive, are true copies of testimony in the aforesaid cause, and formed part of the record as the same appeared to the Court of Claims when the cause came on to trial.

Test this 8th day of February, A. D. 1900.

[SEAL.] JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

COURT OF CLAIMS.

GLEASON & GOSNELL
vs.
THE UNITED STATES. } No. 17782.

EVIDENCE FOR DEFENDANT.

Extract from Deposition of Col. Amos Stickney, for Defendant, Taken at Louisville, Ky., on the 9th Day of February, A. D. 1895.

Defendant's counsel, George H. Gorman, Esq.; claimants' counsel, H. N. Low and Temple Bodley.

Col. AMOS STICKNEY, a witness produced on behalf of the United States, before any questions were put to him, was duly sworn to tell the truth, the whole truth, and nothing but the truth, touching the matters at issue in said cause. Said witness thereupon, in answer to questions put to him by the notary, testified that his name is Amos Stickney; age, a little over 50 years; a resident of Cincinnati, Ohio, at the present time; by occupation a lieutenant colonel of engineers in the United States Army; that he has no interest, direct or indirect, in the subject-matter of the suit; that he is in no degree related to the plaintiffs, and that he has no suit or claim pending against the United States.

Thereupon the said witness, in response to interrogatories propounded to him by counsel, testified as follows:

* * * * * *

Cross-examined by Mr. H. N. Low:

* * * * * * *

157 question. As engineer in charge of this work under this contract with Gleason & Gosnell, what did you consider to be your duty?

Answer. My duty was to supervise their work and see that it was done in accordance with the contract, and, when it was so done, make payments to them in accordance with the contract.

158 question. Did you have any other duty?

Answer. I don't know that I can answer that question, other than to say that I had general charge of the work, and it was my duty to see that the interests of the Government were served, as the officer in charge of the work.

159 question. Did you regard that you were looking after the interests of the Government in refusing the last extension for which these contractors applied?

Answer. I did.

160 question. What about the interests of the contractors?

Answer. I had nothing to do with the interests of the contractors, any further than to see that the obligations of the Government to them were carried out.

161 question. At the time when this extension was applied for did you not positively disclaim any duty with respect to the interests of these contractors?

Answer. The extension that was granted, do you mean, or the extension that was not granted?

162 question. The last extension applied for that was not granted.

(Counsel for the Government objects on the ground of its immateriality and incompetency.)

Answer. I don't remember that the question was ever brought up.

163 question. Did you not, in conversation with Mr. Bodley and with Judge Simrall, at the time when they made application on behalf of these contractors for this last extension, which you refused, state positively that your only duty was to take care of the interests of the Government, and

that you had nothing to do with the interests of these contractors?

(Same objection.)

Answer. It is quite possible that I did, though I don't remember it.

164 question. Will you state whether or not that was your sentiment at that time, if it is possible that you made such a statement to them?

(Same objection.)

Answer. My idea at the time that this last extension was asked was that the interests of the Government which were in my charge required that the contract should not be further extended. The interests of the contractors, it appears to me, were not in my keeping in any way, further than to see that the obligations of the Government to them were fulfilled, and it is probable that that was my sentiment at the time. I had given these contractors as much indulgence as I thought was warranted.

165 question. Did you not, in the conversation with Mr. Bodley and Judge Simrall, to which I have just referred, state positively that you had no duty or obligation so far as the interests of these contractors were concerned?

(Same objection.)

Answer. I really can't remember, as that conversation occurred some five years ago.

166 question. Is it possible that you did?

(Same objection.)

Answer. It is possible; yes, sir.

167 question. Is it probable?

(Same objection.)

Answer. Well, I can't say that.

(At this point counsel for the Government desires to reiterate the objection which he made in the beginning of this cross-examination, to wit, that he objects to all questions and answers in this cross-examination which do not strictly pertain to matters concerning which the witness was examined in chief, and counsel does not feel at liberty to put the Government to the expense of obtaining testi-

mony in this manner. He submits that if counsel for the plaintiffs desired the testimony of this witness upon these matters it was his duty to call the witness as his own and examine him upon them, and therefore counsel gives notice that he will move the court to strike from the files all testimony of this and all other witnesses given in cross-examination, unless such cross-examination was upon matters on which the witnesses had been examined in chief, and will move the court to tax the cost of taking such testimony on plaintiffs.)

Redirect examination by Mr. GORMAN:

168 question. Colonel, from your knowledge of the character and method of construction of the Government cross-dam, concerning which you testified in the early stages of your direct examination, and from your professional knowledge as an expert civil engineer, have you any doubt that said cross-dam was constructed for the purpose of holding the water up at low stages of the river and inducing it to flow into the canal for the purpose of facilitating navigation?

Answer. I have no doubt whatever that the cross-dam was built for the purpose of holding up the water so as to make a greater depth in the canal and in the river above during low stages.

169 question. Is it at all necessary for you to have seen the dam when it was constructed, or had to do with its construction, in order to possess this information?

Answer. It would not be necessary for me to have had anything to do with the construction of the dam to have my opinion backed up by my understanding of the purpose of the dam.

170 question. I understood you to testify, in answer to a question in cross-examination, when you were giving various definitions of the word "dam," that a dam which is used to prevent water from flowing into an adjacent area is called a coffer-dam. Am I correct in that?

Answer. Usually; yes, sir.

171 question. Is this Government cross-dam a coffer-dam?

Answer. It is not.

Recross-examined by Mr. H. N. Low:

172 question. Doesn't this dam prevent the flow of water into the adjacent area at low stages of the river?

Answer. Not entirely. At very low stages it prevents a large portion of the water from flowing into it.

Examined by the NOTARY:

173 question. Do you know anything further about this matter that you haven't stated that you desire to state?

Answer. I probably did know considerably more concerning the details of this matter when it was fresh in my memory. As it has been some five years now since the expiration of this contract and some four years since I left this District, there are many of the details that are not now in my mind, and in this connection I desire to say that in my testimony I have not pretended to be exact with regard to small details where my memory did not serve, but the main facts of the case I remember with perfect distinctness.

And thereupon the witness signed his name.

AMOS STICKNEY,
Lieutenant Colonel of Engineers, U. S. A.

COURT OF CLAIMS.

I certify that the foregoing are true extracts from the deposition of Amos Stickney, filed in the above-entitled cause, which deposition formed part of the printed record when case came on to trial before the Court of Claims.

Test:

This 8th day of February, A. D. 1900.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

The witnesses Bodley and Simrall were uncontradicted and unimpeached, and established for the Court of Claims the fact that the engineer did not give his judgment as contracted for. The reason for this was that he abdicated his contractual duty as arbitrator, and when he did act in

merely refusing additional time, acted only as a party to the contract and agent of the United States.

The testimony of Colonel Stickney, the engineer in charge, is also given above as to his idea of his duty under the contracts and as to what occurred on the occasion of his refusal to allow the contractors additional time, and his evidence is in substantial agreement with that of Messrs. Bodley and Simrall.

The engineer thus not only refused additional time, but also refused to give his judgment as arbitrator upon the questions on which your petitioners, according to your honors' opinion, had contracted for and had a right to his judgment.

This court will see at once that the decision of the circuit court of appeals for the seventh circuit in the case of The Crane Elevator Company *vs.* Clark, 80 Fed. Rep., 705, seemed to the Court of Claims to contain a clear statement of the law applicable to this case. In that case the circuit court of appeals said:

> "The parties have, however, a right to demand that the umpire shall, with respect to every matter submitted to his determination, exercise an independent and honest judgment, and that he shall not arbitrarily refuse to accept performance or to give a certificate. * * * But arbitrary refusal to determine the fact, or arbitrary refusal to accept performance, constitutes a fraud in the law, availing to dispense with the necessity of his judgment as a condition precedent to the right of recovery by the contractor" (p. 708).
>
> "He entertained an erroneous idea of his duty" (p. 709).
>
> "He was a judge between the plaintiff and the defendant, and it was his duty to investigate and decide."

The above decision was rendered after full consideration of and was based upon the decision of this court in the case

of Kihlberg *vs.* United States, referred to in your honors' opinion, and appears in every way consistent therewith.

As to this ground of rehearing, your petitioners ask leave to refer to the annexed brief.

2. Your petitioners respectfully urge, as the second ground of this petition, that the matters appearing in the record on this appeal do not warrant the presumption that the engineer included in his mere refusal to grant additional time a decision on the question of prevention by freshets without fault of the contractors.

While in your honors' opinion it is inferred that a decision that the contractors were not prevented by freshets must be presumed to have been embraced in the engineer's mere refusal to extend the time, your petitioners respectfully call the attention of this court to three considerations:

First. The refusal to extend time may have been *merely as party* to the contract, and *not at all as arbitrator.*

The engineer could, whether for a sufficient or an insufficient reason, refuse additional time, and do this in his capacity as party to the contract. If he did this for the mere purpose of taking the work out of the contractors' hands and doing it himself, nothing can be inferred or presumed from such mere refusal of additional time as to whether he had formed any judgment on the question of freshets or whether he had given to the contractors the benefit of his judgment on that point, which benefit your honors hold was contracted for.

Second. The engineer's finding or decision or judgment as to the freshets *was that there were freshets.* This positively appears in the official reports (finding VII) sent by this engineer to Washington to the Chief of Engineers and quoted in your honors' opinion on pages 4 and 5. (See opinion of Court of Claims, Rec., p. 47.)

Moreover, these reports show that the freshets were so high and continuous as to leave practically no working time during the entire season, and carry with them the conclusion and amount to a finding that the contractors, no matter how faultless, were prevented by forces beyond their control from performing the work during the contract period, which consisted of the season of 1888. The very highest degree of human diligence could not have availed against such freshets.

Your petitioners urge that these reports preclude or estop said engineer officer from being heard to say or decide that the contractors were not prevented by freshets during said season.

Still more do these reports preclude the *presumption* that a decision that there were no freshets was involved in his mere refusal to grant additional time.

Third. If such a presumption does arise it certainly is rebuttable (on which point your petitioners ask leave to refer to the annexed brief), and the twenty-first finding of the court below shows that it has been rebutted.

3. Your petitioners respectfully submit as the third ground of their petition that this court should again consider their ruling that the engineer had the right to base his refusal to extend partly upon faults of the contractors during periods prior to the last extension; and as to this ground your petitioners ask leave to refer to the annexed brief.

4. Your petitioners urge as the fourth ground of their petition that this court in construing the contracts should have given great weight to the contemporaneous construction placed upon them by the parties in practice, which does not appear from the opinion to have been done.

According to the practice of the parties, in no instance did the engineer grant an extension. Every extension, including two expressly on account of freshets (in the case of the

lower work), was granted by the Chief of Engineers (Chicago *vs.* Sheldon, 9 Wall., 54).

PRAYERS.

Wherefore your petitioners pray:

First. That this honorable court may order a rehearing of this cause, especially in order that the true meaning of the twenty-first finding may be again considered, as well as the other material matters and things in this petition stated.

Second. That if this honorable court be of the opinion that there can be any doubt as to the true meaning of the twenty-first finding, a rehearing may be granted, and, pending such rehearing, the cause be remanded to the Court of Claims with directions to make said finding more precise in such particulars as this court shall specify, or to find the immediate facts (but not the evidence) upon which the twenty-first finding is based.

Third. That such other relief may be granted your petitioners as shall seem proper to this court.

JOHN R. GLEASON,
GEORGE W. GOSNELL,
Petitioners,
By TEMPLE BODLEY and
H. N. LOW,
Attorneys and Counsel for Petitioners.

FRANCIS H. STEPHENS,
Of Counsel.

I have examined the questions submitted upon the foregoing petition for a rehearing, and believe them to be of merit and to justly warrant the granting to the appellants of a rehearing of this cause by the Supreme Court of the United States; and I certify that this petition is made in good faith and not for purposes of vexation or delay.

FRANCIS H. STEPHENS.

WASHINGTON, *February* 9, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 59.

THE UNITED STATES, APPELLANTS,

vs.

JOHN R. GLEASON AND GEORGE W. GOSNELL, APPELLEES.

APPEAL FROM THE COURT OF CLAIMS.

Brief in Support of Appellees' Petition for a Rehearing.

We believe that rule 30 is intended to prevent a failure of justice to any suitor of this court arising from oversight or inadvertence of the court, and may be invoked in a case, like the present, of little general importance to the public, though of very great moment to your petitioners.

Although the decision of this case involves the all of our clients, it has been so patiently heard by the court that we should not feel justified in asking a reconsideration of it but for two considerations. We believe the opinion of the

majority is founded upon a misapprehension of vital facts in the record, and that we may be able to make this clear. Again, the fact that three members of the court are of our view persuades us that in essaying to present our reasons for a reconsideration we shall not be thought unduly persistent.

As we read the opinion, these five propositions are held:

First. That the freshet proviso vests the engineer with the discretion to judge for both parties to the contract not only what amount of time would be just and reasonable to be allowed the contractors in case of prevention by freshets, without fault of their own, during the last period of extension, but also of the question whether they were in fact so prevented.

Second. That the *bona fide* decision of the engineer upon these questions was final.

Third. That the contractors had the contract right to such a decision.

Fourth. That the engineer did render such a decision adversely to the claim of an extension.

Fifth. That the engineer had the right to base his refusal to extend partly, but not solely, upon faults of the contractors during periods prior to the last extension.

I.

We propose to here discuss the last two of these propositions. We think we shall be able to show that no such decision as the court holds the engineer made was ever made. If this contention be sound, it will render unnecessary any further construction of the freshet proviso in the contract; for if the engineer did not in fact give the judgment which this court declares the contractors had con-

tracted for, there is no occasion to determine the limit of his power to decide nor the good faith of a decision which he never rendered.

We strongly contended for this proposition on the hearing and in our brief, although the greater part of our arguments were addressed to the construction of the freshet proviso; but because the question of construction was not only fully argued by us, but presumably in the consultation of the members of the court also, and because the opinion expresses an adverse construction without any definite discussion of the terms of the proviso or the other parts of the contract throwing light upon it, we propose, as we said, to proceed to the discussion of the last two above propositions held by the court, viz., *first*, that the engineer did render a *bona fide* decision upon the question whether the contractors were prevented from completing their work during the period of the last extension by freshets and by no fault of their own; and, *secondly*, that the engineer was warranted in basing his refusal to extend in part but not solely upon the ground of faults prior to the last extension.

We have said the opinion decides that the contractors had the contract right to a decision by the engineer upon the question whether they had been prevented from completing their work within the period of the last extension by freshets and no fault of their own. After quoting the opinion of the Court of Claims to the effect that the engineer was not made judge of the fact of prevention by freshets, but only of the amount of additional time to be allowed the contractors in case of such prevention, your honors say:

> "We cannot accept this exposition of the language as sound. Rather do we interpret it to mean that, as between the United States and the contractors, the latter were to be relieved from their contract obligation to complete the work within the time limited, only if, in the judgment of the engineer in charge,

> their failure so to do was occasioned by freshets or other force of the elements, and by no fault of their own; and that, if and when, in his judgment, the failure to complete was, in point of fact, due to the extraneous causes, he was also to decide what additional time should be just and reasonable. In other words, the parties agreed that if the contractors should fail to complete their contract within the time stipulated, they should have the benefit of the judgment of the engineer as to whether such failure was the result of their own fault or of forces beyond their control, and, in the latter event, of his judgment as to what extension of time would be just and reasonable."

The contract right of the contractors to "*have the benefit* of the judgment of the engineer" on the question of prevention by freshets without fault is thus unmistakably declared. It seems also a plain requirement of law and was expressly conceded by counsel for the Government (Brief, p. —).

But was such a judgment ever given, as the court holds it was? If it was not, there has been a plain breach of the contract. Whether it was or was not given is, we submit, a question of fact. Such a question it is the province of the trial court alone to decide. If the contractors had the contract right to have the judgment of the engineer given, then we submit they have a right to prove that it never has in fact been given, and to have the trial court determine, as a matter of fact, whether it has or has not been given. We say "as a matter of fact," for we not only are unable to conceive how the question whether a judgment has been given can be any other than a question of fact, but we do not understand the opinion to hold differently. Whether any tribunal has given a judgment and what that judgment is, are, we think, always questions of fact to be pleaded and proved. In case of a judgment of record, both its existence and its nature will be proved by the record. In other cases, whether a judgment has been given and what it is will be

proved according to the rules of evidence; but in all cases it is proven as a fact. It may be true that the rendition, existence, or nature of a judgment may, like any other fact, be presumed from some other fact proven, and this presumption may be one of fact or one of law; but in all such cases the presumption is based upon facts alleged and admitted or proven.

Now, the opinion evidently means that the engineer's *refusal* gives rise to the presumption that he did decide the question whether the contractors were prevented from completing the work in 1888 by freshets without fault of their own. We need not dispute this proposition. We shall refer to it later; but the opinion, as we read it, goes further and holds that this presumption is *conclusive*. This, we respectfully urge, is error.

We might concede that when the fact is established and admitted that the engineer did refuse to extend the time for completion there is a legal presumption that he did all that was necessary to warrant his refusal; that he did, in fact, give the required decision; that he did (as your honors say, "the parties agreed") give the contractors "the benefit of (his) judgment as to whether such failure was the result of their own fault or of forces beyond their control;" but we submit that on principle and under the authorities this presumption was not a conclusive one, but may be rebutted by proof.

Let it be observed that we are not denying the *finality* of his decision, nor the *honesty* nor the *correctness* of his decision, but the *fact* of his decision. We concede that the engineer, under your honors' construction of the freshet proviso, had *power* to judge for both parties whether there was prevention by freshets; we may concede that if he *gave* such a judgment it was honest and final; we may concede also that from his mere *refusal* to extend a presumption arises that he did give such a judgment; but we deny that

this presumption cannot be overcome by proof of the fact that he never did so judge at all.

That such a refusal to extend is not necessarily tantamount to such a decision is clearly shown by the fact that the engineer, although he may not act or profess to act as an arbitrator, but only *as one of the parties to the contract*, may so refuse. It is clear and it was conceded on argument that in case the engineer decided that the contractors should have additional time, the time was to be "allowed them in writing" by the United States as real party to the contract, acting through its authorized agent. If, then, the United States, acting through its authorized agent, could as a matter of fact make such allowance, so as a matter of fact it could refuse it. This is but saying that the engineer, in his capacity as nominal party to the contract, representing the Government, might in fact have refused the extension *in that character*, in which he could not claim to judge the question of prevention for the contractors, as well as in his other character of arbitrator, in which he had authority to judge it. If so, it follows that from the act of refusal either of two alternative and inconsistent conclusions may be presumed to follow, namely, (1) that his act in refusing was as arbitrator or (2) that it was as a party—that is, of course, as a nominal party acting for his principal, the Government. In the first alternative, his act might or might not be tantamount to a conclusive judgment. In the second, it certainly could not be. And yet this court in its opinion (without warrant in the findings, we respectfully submit) presumes, *first*, that the act of the engineer in refusing an extension was not as a mere party, but as arbitrator, and, *secondly*, from such presumption of refusal by the engineer as arbitrator it builds another and conclusive presumption that he has decided the question as to prevention by freshets without fault.

With the single fact of a mere refusal to extend as the basis for the conclusion that the engineer ever gave any such

judgment, the opinion in numerous places assumes that the judgment was given. It says: "The fallacy, we think, in the position of the court below was in assuming that it was competent to go back of the judgment of the engineer and to revise his action by the views of the court." We think we shall be able to show, on the contrary, that the opinion is not warranted, in that it erroneously assumes that there was such a "judgment of the engineer" for the lower court "to go back of." Under the theory that there is a conclusive presumption of law that the engineer must have decided all that was required by the contract to warrant his refusal (in other words, that he must have given a judgment on the freshet question for the benefit of which your honors say "the parties agreed"), it matters not how certain it may be that the engineer never did in fact give such a judgment, the contractors cannot show the truth.

The extremest supposable case may have existed. An extreme case is conclusively established by the findings here. Although unprecedented and continuous floods may have made any work whatever during the last extension plainly impossible; although the contractors may have been most diligent in preparation for the work and have done everything possible to be done; although the engineer may have even said that he did not and could not judge that they had been in fault or had not been prevented solely by the floods; although he may have thought and declared that he had no duty to judge between the parties, but only to look after the interests of his principal; although he may have declared this verbally, in writing, or in his official reports, still the law shuts off all inquiry into the truth and conclusively presumes *not* merely, mark, that the engineer was honest in what he did, but that he did in fact *do* exactly what he did not do and declared he did not do.

We do not understand this to be the law.

Wharton (who uses the term "presumptions of law" in

the sense generally meant by "irrebuttable or absolute presumptions"—that is, conclusive presumptions) says:

> "It is sometimes said that the law presumes that public officers do their duty. The law, however, presumes nothing of the sort. If a public officer is sued for misconduct, then the case goes to the jury on the evidence, there being no presumption of virtue in his favor sufficient to outweigh preponderating proof on the other side. What the law says, and all that it in this respect says, is that a public officer is so far assumed *prima facie* to do his duty that the burden is on the party seeking to charge him with misconduct. And this is in full harmony with the general rule above given, that on the actor lies the burden. The same reason applies in cases where the conduct of the officer comes collaterally in question. The burden is on those assailing such conduct; and so far, but only so far, the conduct of such officer is *prima facie* presumed to be right. * * * When the facts go to the jury, there is no more a presumption of law in either case that the officer did right than there is that a presumption of law that the private person did right" (2 Wharton Evidence, sec. 1320).

> "The award must be coextensive with the submission. All matters submitted must be considered and decided upon by the arbitrators; and an award which disposes of only part of the subject-matter of the submission will be void. The omission must be *proved* by the party assailing the award, or it must appear upon the face of the award. In the absence of proof it will be presumed that all matters submitted were considered and passed upon."
>
> 1 Am. & Eng. Encyc., 693 and 694, citing many cases.

If proof is admissible to show that an award which has been made was not based on a consideration and decision of all the questions submitted, *a fortiori* proof is admissible to show that the award was never made at all.

In support of the proposition that the facts can be shown as to what an arbitrator has decided, even when it is an established fact that he did render a decision, see 1 Wharton on Evidence, section 599, discussing the question at length. Of course, we need not contend so far if there was in this case really no such decision.

> "All matters submitted to arbitration are presumed to have been passed on in making the award *unless the contrary be affirmatively shown*" (*id.*, Fooks *vs.* Lawson, 40 Atl. Rep., 661).

Surely the engineer, in refusing an extension, even if he could be legally presumed to have acted in his character as arbitrator and not as a party, cannot be more conclusively presumed to have done what he should have done than a public officer; and yet there is no such conclusive presumption even as to a public officer. Observe that we are not contending that we have any right to inquire into his acts within the sphere of his judgment, as authorized by the contract. We now merely contend that there is nothing in this record to show that he ever himself entered that sphere.

It is clear, and your honors hold, that "the parties agreed that (the contractors) should have the benefit of the judgment of the engineer as to whether such failure was the result of their own fault or of forces beyond their control."

Again, the opinion says:

> "We do not wish to be understood to say that it would have been competent for the engineer in charge, if in his judgment the contractors had been duly diligent during the period of the last extension and had acted up to the conditions upon which such extension was granted, to have based his refusal for a further extension upon the *sole* ground that there had been delinquencies during the prior periods of extension. We mean merely to say that, in a *bona fide* exercise of the discretion conferred upon him, that officer might properly observe the conduct of the contractors through the entire scope of their past

> action, in deciding what weight to give to their promises as respected the future, and consider whether previous grants of extension had brought forth such efforts on the part of the contractors as the circumstances required."

Now, the Court of Claims has found as facts that "No JUDGMENT OR DECISION WAS GIVEN BY SAID ENGINEER ON THE QUESTION AS TO WHETHER THE CLAIMANTS WERE PREVENTED BY FRESHETS AND FORCE AND VIOLENCE OF THE ELEMENTS DURING THE SEASON OF 1888 FROM COMPLETING THE WORK AGREED UPON WITHIN THE PERIOD LIMITED BY THE LAST EXTENSION OF THE CONTRACT, nor did he find or decide that the claimants were not so prevented," and that he "based his refusal to further extend the contract because, as he asserted, the claimants had for a number of seasons failed to complete the work within the times agreed upon" (Findings X, Rec., p. 36, and XXI, Rec., p. 41).

Accepting the theory of the opinion of this court to be true (excepting only the conclusiveness of a presumption of law, arising from the mere act of refusing an extension, that the engineer did give a judgment on the question of prevention by freshets without fault during the last extension), we submit that it is a legally found and established fact for this court that the engineer never did give the judgment to which, as you have said, "the parties agreed" the contractors "should have the benefit of."

But, referring to this finding, your honors say:

> "But as it was expressly alleged in the petition and was found by the court, that, on an application for a further extension because of interruption occasioned by force of elements and not by any fault of the plaintiff, the engineer did refuse to extend, the statement of the court must mean either that it was necessary for the engineer, in order to give efficacy to his decision, to declare in terms that it was based on a finding of fault on the part of the contractors, or that the conclusion of the engineer did not amount

to a decision or judgment, within the meaning of the contract, because the court reached a different conclusion.

"These are propositions of law and not of fact, and we cannot assent to either of them."

We think your honors have here misunderstood the position of the lower court.

There is no doubt about the fact that the engineer did refuse to extend, but we submit that it is an error to say that the finding "must mean" either of the things, one or the other, of which your honors infer that it "must mean,' and that the "propositions of law" mentioned in the opinion were therefore not involved in the finding of the lower court, but arise entirely from this court's inference based on a misconception of the true meaning of the finding.

By way of preface to what we shall say in support of this assertion, we suggest that the "judgment or decision" referred to in the finding is not the mere act of the engineer in *refusing* an extension, but is the "judgment" of the engineer referred to in the freshet proviso in the contract, namely, his judgment on the question of prevention by freshets. A mere *refusal* to extend is a very different thing, for, as we have seen, a refusal to extend might occur as the mere act of a *party* to the contract without any judgment whatever as to the cause of prevention. The engineer might have refused to extend whether he judged that there had been prevention solely by freshets, or that there had not been, or without judging that question at all. Suppose when the extension was made he had gone away and had never seen or heard of the work or the condition of it afterwards, but at the end of the extension had sent a writing, saying, "I refuse to extend the contract," would such refusal have necessarily involved a judgment on the question of prevention by freshets? We are not discussing fraud here, but simply whether a refusal affords a

conclusive legal presumption of a judgment. We grant that his refusal may create a presumption that he did render a judgment. But is it conclusive? May it not be rebutted by showing that in fact he never rendered it? If so, may the trial court not find the fact?

Now, the first of the two alternative things, which the opinion says the finding "must mean" when it says that "no judgment or decision was given by said engineer" as to prevention by freshets, "nor did he find or decide that the claimants were not so prevented," is "that it was necessary for the engineer, in order to give efficacy to his decision, to declare in terms that it was based on a finding of fault on the part of the contractors." This your honors then properly say would be an erroneous conclusion of law. We submit, however, that this is not the conclusion of the trial court either expressed or inferable from its finding. It is based upon this court's assumption that the mere refusal of the engineer to extend the contract period was a judgment by the engineer that the contractors had not been prevented solely by freshets from completing the work, an assumption which we have already, we think, shown not to be warranted by the findings.

Certainly we have never contended or thought "that it was necessary for the engineer, in order to give efficacy to his decision, to declare in terms that it was based on a finding of fault on the part of the contractors," nor do we for a moment suppose the lower court did so. Assuming the correctness of your honors' conclusion that the freshet clause empowered the engineer not only to judge for the contractors what amount of time would be "just and reasonable" in case of prevention by freshets, but also to judge whether they were so prevented, we do not at all contend that he must "declare in terms" anything. The contract is silent on the subject; the law makes no such requirement, but we do contend that he must *decide* something in addition to a mere refusal to extend the time. We do

contend, in the language of the opinion, that "the parties agreed that if the contractors should fail to complete their contract within the time stipulated they should have the benefit of the judgment of the engineer whether such failure was the result of their own fault or of forces beyond their control, and, in the latter event, of his judgment as to what extension of time would be just and reasonable." And we contend that, having a right to this judgment, they had a right to have the trial court find as a fact whether they got it—in other words, whether as a matter of fact the engineer ever gave any such judgment (the *benefit* contracted for). It has so found. It declares he never gave any; that he never decided that the contractors were not so prevented or decided at all the question whether they were or not.

The engineer having wholly failed to perform this duty, his mere refusal to extend was, we submit, a breach of the contract.

The second of the two alternative things which the opinion says the finding of the lower court "must mean," when it says that the engineer never in fact gave any judgment or decision on the question of prevention by freshets, is "that the *conclusion* of the engineer did not amount to a decision or judgment within the meaning of the contract, because the court reached a different conclusion."

No "conclusion" appears in the findings. We understand, however, that your honors mean by "conclusion of the engineer" merely his *refusal* to extend, and thence infer as a legal conclusion that the act of refusal was the act of the engineer, not as a party to the contract, but as judge between the parties, and then upon that conclusion base a second and irrebuttable conclusion, namely, that his refusal was based upon, and therefore tantamount to, a judgment that there had not been prevention by freshets without fault.

We would suggest, first, that there was neither in fact nor by presumption of law any such "conclusion of the en-

gineer," as the opinion assumes, and, secondly, that the assumption violates another rule of law: that there shall be no presumption upon a presumption.

Had the substantive fact been established that the engineer did give a judgment on the question which the contract submitted to him, there would be a basis for a presumption that the judgment covered that question; but, as this court said in U. S. *vs.* Ross, 2 Otto, 281:

> "It is obvious that this presumption could have been made only by piling inference upon inference and presumption upon presumption." "The presumption that public officers have done their duty, like the presumption of innocence (a rebuttable one), is undoubtedly a legal presumption; but it does not supply proof of a substantive fact." "Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or law is reliable drawn from premises which are uncertain."

In the present case, with absolutely nothing to show that the engineer ever in truth decided or intended to decide the question of prevention by freshets during the period of extension (or for that matter during any other period), the opinion, as we understand it, from the one fact of refusal to extend, makes this series of inferences: *First*, that the refusal must have been by the engineer in his capacity of judge, and, upon that, *secondly*, that he must have decided the question of prevention by freshets, and upon that, *thirdly*, he must have decided it adversely to the contractors, for, *ex hypothesi*, "the parties agreed" that contractors "should have the benefit of the judgment of the engineer" on that question, and he could not "have based his refusal for a further extension upon the *sole* ground that there had been delinquencies during the prior periods of extension," and therefore must have based them at least in part upon delinquencies during the last extension.

And this brings us to the proposition that the findings show unerringly that in fact, if the engineer could be said to have decided anything or to have given or intended to give any judgment whatever, *such a judgment must have been based "upon the* SOLE *ground that there had been delinquencies during the prior periods of extension."*

Aside from the *conclusive* presumption of law, which we have sufficiently discussed, and which we think your honors will agree is untenable, all the facts as to what the engineer did base his refusal on are shown in findings X and XXI.

Now, those findings show, first, that he gave "no judgment or decision" whatever concerning delinquencies during the last extension, and, secondly, that he based his refusal to extend *exclusively* on the mere fact that "the claimants had for a number of seasons *failed to complete* the work within the times agreed upon." Now, we submit that there is no other source of information for this court as to what the engineer did or did not do in this regard aside from these findings. It seems clear, and we understand from the opinion that your honors hold, that the affidavit of the engineer filed in the court below on the motion for a new trial cannot be considered here or militate against the findings. We discussed this matter fully in our first brief.

When, therefore, the engineer based his refusal upon the mere fact that "the claimants *had* for a number of seasons *failed to complete* the work within the times agreed on," we submit, in the first place, that this has nothing whatever to do with the causes of prevention during the last extension, which "the parties agreed" the contractors should have the right to have his judgment on, and, secondly, failure to complete during the prior periods of extension not only could not, as your honors say, be "the sole ground" of a refusal to extend, but such mere failure to complete in nowise shows any fault on the part of the contractors. So

far as the findings show, not only may the failure to complete have been waived, but it may even have been due to the act or orders of the Government itself. As the lower court said: "Both parties treat the extensions as having been made upon sufficient grounds. * * * Whatever delays or defaults on the part of the claimants may have occurred prior to the last extensions of the contracts were waived by the defendants, and once waived cannot be revived" (R., 44). We understand the opinion of this court recognizes this to be the law. (We submit that it is the law, and refer to our brief concerning it.)

But this court's opinion says:

> "It was further suggested by the court below, and has been vigorously pressed upon us in the argument, that the engineer in charge was improperly influenced in refusing the third extension asked for, by a consideration of delinquencies in previous years, whereas it is claimed that the extended contracts were, in respect of their several dates, new contracts, the performance or non-performance of which did not depend upon anything done or omitted to be done thereunder prior to the last extension.
>
> "It may be that, by granting the previous extensions, the right of the Government to forfeit the compensation already earned and withheld under the terms of the contract was abandoned; but to say that the engineer in charge, when applied to for a third extension, may not take in view previous delinquencies and the futility of the extensions theretofore granted, seems to us quite unreasonable. He might well think that his duty to the Government and to the public interested in the early completion of the work forbade a *further experiment* in that direction. An indefinite succession of extensions was surely not within the contemplation of the contract. We do not wish to be understood to say that it would have been competent for the engineer in charge, if in his judgment the contractors *had been duly diligent during the period of the last extension* and had acted up to the conditions upon which such extension was granted,

> to have based his refusal for a further extension upon the *sole* ground that there had been delinquencies during the prior periods of extension. We mean merely to say that, in a *bona fide* exercise of the discretion conferred upon him, that officer might properly observe the conduct of the contractors through the entire scope of their past action, in deciding what weight to give to their *promises* as respected the future, and consider whether previous grants of extension had brought forth such efforts on the part of the contractors as the circumstances required."

We would respectfully point out what it seems to us should be reconsidered in this reasoning of the court.

In the first place, our contention has been not merely "that the engineer in charge was improperly influenced in refusing the third extension asked for by a consideration of delinquencies in previous years," but that he did base his refusal "*solely*" upon such "delinquencies," if we admit that the mere fact that the contractors "failed to complete the work" was a delinquency, and this notwithstanding there is no finding of fault as to the causes of such failure, and notwithstanding waiver of any such faults by the extensions. There are two expressions in the quotation we have given of the language of the opinion touching the right of the engineer to consider delinquencies in previous years, to which we desire to call attention. Your honors say that "he (the engineer) might well think that his duty to the Government and to the public interested in the early completion of the work forbade a further experiment in that direction"—that is, in extending the contract period. We may infer from finding X that this was precisely the engineer's idea. We submit that that would be unfair and erroneous. It is plain from the contract, and it is held in this court's opinion, that under the freshet proviso the engineer was to act as a judge between the parties touching the question of prevention by freshets without fault; that they had a *right* to his judgment on that question, and that if in his judgment they were so pre-

vented they had the further *contract right* to his judgment as to the amount of additional time to be allowed them. This being true, we submit, in the first place, that the engineer's "duty to the Government and the public" should no more have controlled his judgment or his action than his correlative duty to the contractors, and, in the second place, that it was not a question of "further experiment" in granting extensions, but if in the engineer's judgment the flooded condition of the river alone prevented completion in 1888, it was a question simply whether the contractors should have or be denied the just and reasonable extension which the contract guaranteed to them.

Again, pursuing the same line of reasoning (and, it seems to us, considering the engineer as if he were acting under the freshet proviso for his principal alone), and after saying that while he could not lawfully "have based his refusal for a further extension upon the *sole* ground there had been delinquencies during the prior periods of extension," your honors say: "That officer might properly observe the conduct of the contractors through the entire scope of their past action in deciding what weight to give to their *promises* as respected the future, and consider whether previous grants of extension had brought forth such efforts on the part of the contractors as the circumstances required." We submit that there is no question here of "promises" or the probable carrying out of promises, but only of the stipulations contained in the already existing contract itself. Your honors have to construe and give proper effect to a *contract*. Granting fully the correctness of the court's construction of the freshet proviso and the very ample extent of the engineer's power, and granting every presumption in favor of his proper exercise of that power, we still respectfully submit that when the extension for 1888 was given the contractors, subject only to the judgment of the engineer as to the cause of prevention that year, they had the contract right to such additional time as he should judge reasonable;

that this court has so held; that otherwise the declaration in the opinion that "the parties agreed that * * * they should have the benefit of the judgment of the engineer," etc., and the other declaration that it would not "have been competent for the engineer * * * to have based his refusal for a further extension upon the *sole* ground that there had been delinquencies during prior periods of extension" can mean nothing, and, finally, that whether the engineer thought that the previous conduct of the contractors gave promise of completion of the work within such "just and reasonable" additional time or not was entirely immaterial. Unless this court is willing (and we are sure it is not) to adopt the extraordinary contention for the appellant that the freshet proviso has been in some way eliminated from the contract by the extensions, or is willing to hold that even if the engineer himself judges that during the last extension unprecedented floods alone made any work whatever impossible, he still has the right to refuse any additional time whatever, then we submit that if the engineer finds that the last extension has thus been rendered valueless solely by the floods, the contractors have the contract right to "just and reasonable" additional time without making any "promises" whatever and regardless of what the engineer may think either of such promises or the conduct of the contractors prior to the last extension. If this be not true, then when the contractors entered into this contract to excavate the bottom of this swift river at the falls, and stipulated that if they should be unavoidably delayed by freshets they might be allowed additional time, such as, in the judgment of the engineer, would be just and reasonable, they were not contracting for a beneficial protection nor, as the opinion says, "for the benefit of the *judgment* of the engineer," but for the merest "grace" of the other contracting party—a grace which in nowise depended upon the *contract*, but on the *graciousness* of that party. We do not so understand the opinion or the law.

II.

Concerning the first proposition held in this court's opinion, namely, that the freshet proviso vests the engineer with the discretion to judge for both parties to the contract not only what amount of time would be just and reasonable to be allowed the contractors in case of prevention by freshets without fault of their own during the last period of extension, but also to judge whether there was such prevention by freshets, we desire merely to call attention to two vital points not discussed in the briefs.

It will be remembered that our first contention was that in the first clause of the freshet proviso, which states fully the condition of extension, "*If (the contractors) shall by freshets, ice, or other force or violence of the elements and by no fault of his or their own be prevented either from commencing or completing the work or delivering the material at the time agreed upon in this writing,*" the engineer is not mentioned, and that neither in this clause nor in any of the language following is the question of such prevention *expressly* referred to his decision. (The opinion says nothing to the contrary.) We then argued that if the engineer was made judge, both for the Government and the contractors, of the happening of the contingency of such prevention solely by freshets, his authority in this respect must be *implied* from the next clause, which says, "*such additional time may in writing be allowed him or them for such commencement or completion as in the judgment of the party of the first part or his successor shall be just and reasonable.*"

The opinion does not say whether such implication is warranted by any rule of construction recognized in the law; but it does hold (and we must presume by implication from some word or words in this second clause) that the engineer was by the freshet clause made arbitrator or judge to decide, not merely for his principal, but for the contractors,

whether, as a matter of fact, the freshets did make the completion of the work impossible.

Your honors say:

> "The contract fixes the time within which the work must be completed, but provides that in case failure to complete is providential and without fault, such additional time may be allowed as the engineer may judge to be just and reasonable.
>
> "As then his granting of additional time would be final and irrevocable, so his refusal to allow it was necessarily final. The privilege of procuring an extension of time is conditional on the action of the officer, whether he grant or refuse it."

We submit that these conclusions do not necessarily follow. To say that his "granting" or his "refusal" was "necessarily final" assumes that his mere act of granting or refusing necessarily presupposes, as a conclusive presumption of law, that he had given the judgment on the question of prevention by freshets for which this court says the contractors agreed and which was a condition precedent to a lawful granting or refusal. Such a conclusive presumption, we have seen, is unwarranted. Whilst under this court's construction of the freshet proviso we may grant that a judgment on this question would be final, we submit that when the finding is that no such judgment was ever in fact given, the mere act of granting or refusing was not "final."

Again, the same reasoning applies to the other statement that "the privilege of procuring an extension of time is conditional on the *action* of the officer, whether he grant or refuse it." On the contrary, we submit that the privilege was conditional upon the *judgment* of the engineer as to the cause of prevention; and if any such judgment had been in fact given by him, that would have determined the existence of the privilege. And yet, as we have seen, the action of the engineer may have been taken whether he recognized or disregarded such a privilege.

Again, your honors say, "By changing the phrase 'such additional time may be allowed' into the phrase 'such additional time shall be allowed,' the court below substituted for an appeal to the discretion and decision of the officer an absolute right to have the question of prevention determined by the court." Waiving here, because not germane to the subject in hand, any question as to the assumption in this proposition that the question of prevention was within the engineer's province, we would suggest that neither the lower court decided nor have we contended for a substitution of the court's decision for that of the engineer. We did claim that the question of prevention was not within his province. Waiving that now, we do claim, and this court has held, not that the decision of the court shall be "substituted for an appeal to the discretion and decision of the engineer," but that there must have *been* such a decision of the engineer or a breach of the contract. The lower court finds as a fact that there was no such decision, and (the province of decision on the part of the engineer being in that event immaterial) it then holds there was a breach, finds the damages and gives judgment for them.

If, as this court holds, this freshet proviso was intended to give the contractors a substantial legal right, namely, the right to the engineer's judgment on the question of prevention and as to the amount of time to be allowed them in case of prevention by freshets without fault, we submit that this right must necessarily be deduced from the words "may be allowed them." There are no others from which it can be implied. We ask the court to consider if this is not true. The first clause of the proviso does not mention the engineer. It merely states the contingency of prevention by freshets without fault as a condition precedent to what follows. Then comes the language of the second clause: "*Such* additional time may in writing be allowed (them) *as* in the judgment of the (engineer) shall be just and reasonable."

Now, the question here is not whether, within its proper sphere, the judgment of the engineer is "final," but what is the extent of that sphere of judgment. Your honors, combating an illustration which we think was intended to relate to a different matter, say (p. 9): "It is obvious that, from the very nature of the case, the decision of the engineer * * * must be final." We may grant that any decision he really gave was final; but the question here is not as to the finality of his decision, but whether the words "such additional time may in writing be allowed (them) * * * as in the judgment of the (engineer) shall be just and reasonable" either expressly or impliedly refer to his judgment the happening of the contingency stated in the preceding clause. We contended that, as these words do not say that "such additional time may be allowed * * * *by the engineer*," but can as well be allowed directly by the contract itself, *ex proprio vigore*, there is no warrant for resorting to implication and interpolating those words, "by the engineer," after the word "allowed," and thus extending the sphere of his judgment so as to include not only the amount of time, which is expressly referred to him, but the act of God, which is not expressly referred to him. Counsel for appellant contended that the word "may" left both these matters to the mere "grace" of the engineer, and gave no privilege or right to the contractors, but only a privilege to the other party to the contract. Your honors, as we have seen, have repudiated this view and held that under the freshet proviso the contract gave the contractors a *substantial right*—namely, the "agreed" right to "have the benefit of the judgment of the engineer as to whether such failure was the result of their own fault or of forces beyond their control, and in the latter event of his judgment as to what extension of time would be just and reasonable."

Now, if it can be and is made to appear to this court (we are not saying it can be or is; we have discussed that else-

where) that the engineer denied them this right, then there has been a breach of the contract; otherwise the language quoted from the opinion would mean nothing.

But if, upon the happening of the contingency of prevention by freshets without fault, the word "may" in the clause "additional time may be allowed them" can thus of *its own force* give them the limited right to "such additional time" upon the engineer's judging that there was such prevention, then *why may not the very same words, of their own force, give them broader right to such additional time without the engineer's judgment* (except as to the amount of such time)? Why imply a power to him and substitute the force of his judgment for the force of the contract and leave the allowance of additional time to the engineer rather than to the contract itself?

Without going into any detailed argument, we submit that such an implication would be a forced one and contrary to all the rules of construction stated in our brief.

It implies when implication is not necessary to give full effect to the language used. It construes the words most strongly in favor of the party drawing the contract. It creates by implication an entirely exceptional and very extraordinary power in one party (the agent of the real party) to bind the other party in a matter of the most obvious and vital importance.

All this is so contrary to what seems to us the technical law, as well as the substantial justice of the case, that we earnestly beg a reconsideration of it.

The opinion says: "Obviously the object of the provision in question was to prevent the very state of dispute and uncertainty which would be created if the present contention of the contractors were to prevail." We respectfully submit that there was another and a vastly more important object of the provision, and that was to provide that if the act of God alone, without any fault whatever of the contractors, should make the work impossible, the contractors

should have such additional time as "shall be just and reasonable." The mere fact that the engineer is *expressly* made judge of the *amount* of time, surely gives no reason for *implying* a power in him to judge for the other party whether the act of God alone has prevented completion of the work.

Again, the opinion, after saying that the engineer might well think his duty to the Government forbade a further experiment in extension, says: "An indefinite succession of extensions was surely not within the contemplation of the contract." We concede this. We suggest, however, that so far as past extensions under this particular contract are concerned, the reasons for them are not known and they are irrelevant to the construction of the contract. The question is whether, when the contract was in fact extended for 1888 and the contractors not merely induced, but required to make large outlays on the faith of it, they should, although prevented from completing the work solely by obvious and irresistible act of God, be denied, *not* "an indefinite succession of extensions," but "such additional time * * * as may be just and reasonable." In truth, there is and can be no danger of such indefinite extensions. As we have shown in our brief, every extension under both of these contracts was given only because it was "in the interest of the Government." The engineer evidently considered himself solely as an agent of the Government and not as a judge between the parties bound to do justice to both alike. Under our construction of the contract the Government is at no disadvantage. Quite the contrary. The contractors would have no right to "additional time, * * * just and reasonable," unless necessarily notorious floods are the sole cause of delay, and then only such time as the other party to the contract fixes. Under such a contract we earnestly ask which construction best does substantial justice?

III.

Since the affidavit of Major Stickney is referred to in your honors' opinion (p. 10), we call the attention of the court to the fact that in it the engineer confesses that a reason for his refusal to grant a further extension was "that they (the contractors) had not fulfilled the conditions upon which the time had already been extended." Surely the contracts did not make him the arbitrator or final judge of this. It was open for the Court of Claims to decide this fact for themselves, and they found that the *conditions had been fulfilled* (Finding VIII).

IV.

The general conclusion of the opinion, that the contractors are not entitled to the profits claimed, may have been approved by your honors partly because of a belief that it does not appear from the findings that the contractors would have performed the remaining work within any reasonable time.

It is therefore here suggested, as to this point, that the findings show that with a certain plant the contractors had excavated 35,435.22 cubic yards (Finding XII). They then practically *doubled their plant* (engineer's letter of December 31, 1887, in Finding IV, and Finding VIII), so that it was capable of excavating 640 cubic yards a day (Finding VIII). There remained to be excavated 83,500 cubic yards (Finding XII).

It is therefore a mere matter of arithmetic to ascertain, by dividing 640 into 83,500, that the contractors could reasonably have performed the remaining excavation in 131 days.

The findings, therefore, *do* show that the remaining work could have been performed within a reasonable and *definite* time.

The above refers to the Upper work. In the Lower work hardly anything remained to be done.

We respectfully submit that, whether or not your honors may consent to again consider the meaning of the contracts, in any event the engineer's failure to give any judgment, such as your honors find "the parties agreed" that the "contractors should have the benefit of," was a clear breach of the contracts, and should move the court to grant the rehearing prayed for.

TEMPLE BODLEY,
H. N. LOW,
Attorneys and Counsel for Petitioners.

FRANCIS H. STEPHENS,
Of Counsel.

UNITED STATES *v.* GLEASON.

APPEAL FROM THE COURT OF CLAIMS.

No. 59. Argued December 7, 8, 1899.— Decided January 8, 1900.

The United States, through an officer of Engineers, contracted with the appellees to excavate rock within a fixed time. The contract contained the following provisions among others: "If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties (or either of them) of the second part, and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon author-

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ized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States; provided, however, that if the party or parties of the second part shall, by freshet, ice or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon." *Held* that, under a proper construction of this contract, the right or privilege of the contractors, if they failed to complete their work within the time limited, to have a further extension or extensions of time, depended upon the judgment of the engineer in charge when applied to to grant such extension; and that no allegation or finding is shown in this record sufficient to justify the court in setting aside the judgment of the engineer as having been rendered in bad faith, or in any dishonest disregard of the rights of the contracting parties.

THIS appeal is from a decision of the Court of Claims covering two suits in that court, Nos. 17,782 and 17,783, consolidated and heard and decided as one suit, in which judgment was entered for the plaintiffs.

The first suit was on a contract entered into August 4, 1885, between Lieutenant Colonel W. E. Merrill, Corps of Engineers, United States Army, for and on behalf of the United States, and John R. Gleason and George W. Gosnell as partners, for the excavation of 110,000 cubic yards, more or less, of rock, in the improvement of the head of the Louisville and Portland Canal at Louisville, Kentucky, which excavation was called, in this litigation, the Upper Work.

The second suit was on a contract entered into January 13, 1887, between Major Amos Stickney, of the Engineer Corps of the United States Army, for and on behalf of the United States, and the firm of Gleason & Gosnell, for the excavation of 124,000 cubic yards of earth and 13,000 cubic yards of rock, more or less, for enlarging the basin near the lower end of the same canal, and called herein the Lower Work.

Statement of the Case.

In the first suit, upon findings of fact and law, there was a judgment in favor of the plaintiffs for retained percentage in the sum of $3011.99, and for net profits which they would have made if they had been allowed to complete the work in the sum of $60,537.50. In the second suit there was a judgment for retained percentage in the sum of $2401, and for net profits, if the contract had been carried on to completion, in the sum of $2827.50. The aggregate judgment in the two cases was for the sum of $68,777.99.

There was a motion for a new trial, which was overruled, and also for an amendment of the findings of fact, which was granted in part. Thereupon this appeal was taken.

The findings of fact in the suit upon the first contract were as follows:

"I. On August 4, 1885, Lieutenant Colonel William E. Merrill, Corps of Engineers, United States Army, for and on behalf of the United States, party of the first part, and John R. Gleason and George W. Gosnell, partners, of the second part, entered into the contract and specifications set out in full with and made a part of the petition herein, whereby the claimants agreed to commence work on or before August 20, 1885, and make '110,000 cubic yards, more or less, of rock excavation in the enlargement of the Louisville and Portland Canal,' as therein provided for, at the rate of 85 cents per cubic yard, and to complete the same on or before December 31, 1886.

"Said contract further, and among other things, provided that —

"'If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties (or either of them) of the second part, and upon the giving of such notice all money or reserved per-

centage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States; provided, however, that if the party or parties of the second part shall, by freshets, ice or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.'

"II. The season from August, 1885, to December 31, 1886, was favorable in the main for the character of work provided for by the contract, though the claimants were compelled by reason of high water and freshets to suspend their operations a number of times, and by reason of these difficulties, coupled with an insufficient force of men and other means necessary for the performance of the work, they only 'completed 14 per cent of their entire work' during the contract period, 1½ per cent of which was done in 1885.

"III. In consequence of the claimants' inability to complete the work within the contract period, as aforesaid, they requested an extension of their contract to December 31, 1887, which was granted on conditions stated in a supplemental contract, as follows:

"'Articles of Agreement.

"'Supplemental articles of agreement entered into this 21st day of January, eighteen hundred and eighty-seven (1887),

between Major Amos Stickney, Corps of Engineers, U. S. Army, of the first part, and John R. Gleason and George W. Gosnell, partners, doing business under the firm name of Gleason & Gosnell, of Louisville, of the county of Jefferson, State of Kentucky, of the second part.

"'This agreement witnesseth that the said Major Amos Stickney, for and in behalf of the United States of America, and the said Gleason & Gosnell, for themselves, their heirs, executors and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other as follows:

"'That the time for completing the contract signed by the said Gleason & Gosnell, August 4th (fourth), eighteen hundred and eighty-five (1885), for rock excavation in the enlargement of the Louisville and Portland Canal, be extended to December 31st (thirty-first), eighteen hundred and eighty-seven (1887), upon the following conditions, viz.:

"'First. That the said Gleason & Gosnell shall so arrange their excavation on the line common to sections 2 (two) and 3 (three) as not to interfere with the government work of contractor Molloy or the work of the contractor for the new wall of the said Louisville and Portland Canal.

"'Second. That should the said Gleason & Gosnell fail to employ a sufficient force, not less than three hundred (300) men, or its equivalent in machinery, to finish their work in the required time, then the officer in charge shall be authorized to perform any of the work in his discretion, and deduct the cost from any money due or to become due the said Gleason & Gosnell.'

"The foregoing agreement was made subject to approval of the Chief of the Engineers, United States Army, and was thereafter duly approved by the acting Secretary of War.

"IV. The claimants not having completed their contract during the year's extension thereof as aforesaid, they, on December 31, 1887, requested a second extension of said contract to December 31, 1888, for the reasons set forth in their communication of that date, which is as follows:

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"'LOUISVILLE, KY. *Dec.* 31*st*, 1887.

"'Major AMOS STICKNEY,

"' *Corps of Engineers, U. S. A.*

"'DEAR SIR: We respectfully ask an extension of time on our contract for enlarging the Louisville and Portland Canal at the head of the Falls of the Ohio River until the 31st of December, 1888, for the following reasons, to wit:

"'There was so much work being done upon railroads during the last year throughout the State that labor was very hard to get.

"'We used every effort to secure the required amount of labor on our contracts, but found it impossible to do so. We even employed agents in New York and other cities to procure and ship labor to us here, and then found it very difficult to hold the labor we obtained, although we paid more than contractors paid for labor on railroads. Besides, the summer season was excessively hot; so very hot, that for sixty to ninety days, in many instances, the men would work only two or three hours a day.

"'We propose to provide not less than ninety cars of the same capacity as those now used, and a sufficient number of carts and teams in addition, if necessary, to move not less than 640 cubic yards (measured in place) of excavated rock per day of ten hours.

"'We propose to build an additional incline for depositing excavated material, the minimum actual working capacity of both inclines to be not less than 640 cars per day of ten hours.

"'We propose to provide, maintain and operate not less than ten steam drills on the work and to provide and operate a sufficient force of men to excavate and handle at least 640 cubic yards of rock (measured in place) per day of ten hours.

"'The method of carrying on the work will be such as will be approved by the officer in charge.

"'When practicable, during the summer season, we propose to provide and operate an adequate force at night.

"'All additional plant will be obtained and available for use by the time rock excavation can be commenced, and we pro-

pose to bear all extra cost to the United States occasioned by the extension of time for completing our contract.'

"Which letter was forwarded to the Chief of Engineers with the following communication:

"'U. S. ENGINEER OFFICE,
"'LOUISVILLE, KY., *December* 31*st*, 1887.
"'The CHIEF OF ENGINEERS, U. S. Army,
"'*Washington, D. C.*

"'GENERAL: I have the honor to forward herewith an application of Gleason & Gosnell for the extension of time for completion of their contract on work of excavating for enlargement of the head of the Louisville and Portland Canal.

"'The work of these contractors during the past season has been exceedingly unsatisfactory. Whilst they have had some difficulties to contend with in procuring labor, they have not conducted their work in a manner to produce the best results, and hardly seemed to comprehend the magnitude of their undertaking.

"'After a number of consultations with the contractors and their principal bondsman, I have, however, concluded that the interests of the government will be best served by an extension of time with the provisions which they have inserted in their application.

"'These provisions call for nearly double the plant heretofore used and the adoption of method of work which will be approved by the engineer in charge; also the bearing of all extra expense to the United States occasioned by the extension of time. With these provisions, I believe the engineer officer in charge will be able to push the work more rapidly than if it were relet to other contractors. I therefore recommend that the time for completing of their contract be extended as requested to December 31, 1888, on condition that the provisions in their application are faithfully carried out.'

"The extension of the time of said contract to December

31, 1888, as requested and recommended, was granted and approved by the Chief of Engineers 'on condition that the provisions in their application are faithfully carried out,' of which approval the claimants were notified by the following letter:

"'U. S. ENGINEER OFFICE,
"'LOUISVILLE, KY., *January 9th*, 1883.

"'Messrs. GLEASON & GOSNELL,
"'*Louisville, Ky.*

"'SIRS: You are hereby notified that the time for completion of your contract for excavation in enlargement of the head of the Louisville and Portland Canal is extended to December 31, 1888, on condition that the provision in your letter of December 31, 1887, a copy of which is inclosed, shall be faithfully carried out. Any failure to carry out these provisions will terminate your contract.

"'Very respectfully,
"'AMOS STICKNEY,
"'*Major of Engineers*, U. S. A.'

"V. The rock to be excavated under the contract was in the river bed in an exposed situation, and was exposed to great force of the river when the latter rose to stages above the top of the government cross dam, which cross dam was 5 feet high, measured by the canal gauge.

"VI. Before the contract aforesaid was entered into the engineer in charge prepared specifications for the information of bidders, which were exhibited to the claimants, and on the faith of which they entered into the contract. These specifications (7) contained the provision that the contractor 'must begin work within twenty days after notification that his bid has been accepted, unless hindered by high water.'

"They were advised by the ninth specification so exhibited that their contract would provide 'that additional time may be allowed to a contractor for beginning or completing his work in cases of delay from freshets, ice or other force or violence of the elements, and by no fault of his or their own.'

"VII. The condition of the Ohio River was during the sea-

son of 1888, the period of the last extension, unusual and unprecedented for repeated and continued freshets and high water, overflowing the cross dam aforesaid; in consequence of which freshets and high water the working season of 1888, in the Ohio River at Louisville, Ky., was limited to about thirty-five days, mostly in July and August, as will more fully appear from the official monthly report of the defendants' officers of the progress of the work (known as section 3) from December, 1887, to December, 1888, as follows:

"'DECEMBER, 1887.

"'On section 3, Gleason & Gosnell, contractors, very little was done in December, except the removal of loose material which had been left above grade and in getting out machinery in anticipation of closing for the season. The water is several feet deep over both sections.'

* * * * *

"'MARCH, 1888.

"'The stage of the river has prevented any work being done on the contracts of John Molloy, Gleason & Gosnell, and the Salem Stone and Lime Co.'

* * * * *

"'APRIL, 1888.

"'No work has been done by the contractors on account of high water in the upper section.'

* * * * *

"'MAY, 1888.

"'No excavation has been made by the contractors for the upper sections on account of high water.'

* * * * *

"'JUNE, 1888.

"'On section 3, Gleason & Gosnell, contractors, a temporary earth dam has been constructed, the pumps started, and drilling on high points of rock begun. The first blasting was done June 30th.'

* * * * *

"'JULY, 1888.

"'On section 3, Gleason & Gosnell, contractors, drilling on high points of rock was continued and a temporary dam of

earth finished. The pit was pumped out and tracks surfaced. The contractors were run out by high water on the 11th instant and have not resumed.'

* * * * *

"'AUGUST, 1888.

"'On section 3, Gleason & Gosnell, contractors, excavation was continued until the 18th of August, on which date the work was flooded by high water.'

* * * * *

"'SEPTEMBER, 1888.

"'On section 3, Gleason & Gosnell, contractors, no work has been done since the contractors were run out by high water in August.'

* * * * *

"'OCTOBER, 1888.

"'On section 3, Gleason & Gosnell, contractors, a temporary earth dam was begun on October 5th. The contractors' pump was started on October 9th, and on the 11th the river washed away the dam, since which time no work has been done.'

* * * * *

"'NOVEMBER, 1888.

"'On section 3, Gleason & Gosnell have done no work since October 11th. The river has been over their section since that date.'

* * * * *

"'DECEMBER, 1888.

"'No work has been done by the contractors during the month. The contract of Gleason & Gosnell expired on December 31st.'

* * * * *

"VIII. During the working season of 1888 the claimants were diligent in the prosecution of work embraced in the contract, in preparing therefor, and in endeavoring to exclude the water and freshets of the river.

"They provided for the additional plant mentioned in their application for extension and had it ready for operation at the beginning of the season of 1888. But there was insufficient

working time to complete the work by December 31, 1888, at the rate of 640 cubic yards for each practicable working day of twenty-four hours, and this from no fault of the claimants during the last extension of their said contract. No act or omission of the claimants during the period of the last extension made it impossible to complete the work by December 31, 1888.

"IX. The force of the defendants' officer in charge of this same work after December 31, 1888, was, by reason of the overflow of the river, compelled to cease the work of excavation, to wit, in 1889 and 1890, at stages of water at from 6.1 to 6.10 feet, and they did not complete the work in three seasons subsequent to 1888.

"X. After the working season of 1888 the claimants, through the personal solicitation of their attorneys, Bodley & Simrall, applied to the engineer in charge for an allowance of additional time for the completion of the work agreed upon in the contract so extended for the reason that they had been, by freshets and force and violence of the elements and by no fault of their own, prevented from completing the work at the time agreed upon in the contract, whereupon the engineer in charge refused to allow such additional time.

"The defendants, nor the engineer officer in charge on their behalf, did not annul or terminate the contract as therein provided for by reason of any delay or for any want of faithfulness or diligence on the part of the claimants in the prosecution of the work thereunder during the period of the last extension of said contract, but based his refusal to further extend the contract, because, as he asserted, the claimants had for a number of seasons failed to complete the work within the times agreed upon.

"No judgment or decision was given by said engineer on the question as to whether the (J. R.) claimants were prevented by freshets and force and violence of the elements during the season of 1888 from completing the work agreed upon within the period limited by the last extension of the contract, nor did he find or decide that the claimants were not so prevented.

"XI. The amount of the reserved 10 per centum under said contract is $3011.99, and has never been paid by the defendants to the claimants.

"XII. The total amount of rock in the area covered by the contract, as finally estimated by the defendants, was 118,935.22 cubic yards, of which the claimants had removed 35,435.22 cubic yards, leaving unremoved at the end of the season of 1888, 83,500 cubic yards.

"XIII. The cost to the claimants of performing this remaining work, 83,500 cubic yards, would have been $1.25 per cubic yard, and their total loss thereon at the contract price therefor would have been 40 cents per cubic yard, or $33,400.

"XIV. Under the specifications (2), made part of the contract and set out in the petition aforesaid, it is provided that 'all material excavated under this contract will be the property of the contractor, and must be disposed of in such manner as not to interfere with navigation, of which the engineer in charge shall be the judge. The contractor is forbidden to desposit any excavated material on canal property without permission.'

"Every yard of solid rock would have produced, by crushing, 1½ yards of broken stone, and upon this basis the remaining rock in the area covered by the contract at the end of the season of 1888 would have produced 125,250 cubic yards of broken stone.

"XV. The rock, when excavated and crushed, was a valuable commodity, for which there was a ready market in Louisville at $1.25 per cubic yard.

"XVI. The cost to the claimants of crushing and delivering the rock for the market was 50 cents per cubic yard and the net value to the claimants of the crushed and delivered rock was 75 cents per cubic yard, or $93,937.50, less the loss of $33,400, as set forth in Finding XIII, leaving $60,537.50 as the claimants' net profit under the contract for the remaining work.

"XVII. From the foregoing official reports, as well as from the other facts found herein, the court finds the ultimate fact that the condition of the river was as herein set forth;

and the time remaining for active work, after deducting the time when it was impossible to do work by reason of the high water and freshets, was insufficient for the completion of the work under the contract within the period of extension, and that it was impossible for the claimants to complete the work within the working time thus remaining."

The findings in the second case were substantially similar.

Mr. Special Attorney Gorman for appellant. *Mr. Assistant Attorney General Pradt* was on his brief.

Mr. Temple Bodley and *Mr. H. N. Low* for appellees. *Mr. John G. Simrall* was on their brief.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

Gleason & Gosnell, a firm of contractors, entered into agreements with officers of the Engineer Corps of the United States Army, acting for and on behalf of the United States, whereby the former undertook to perform certain specified work within a certain specified time. The work specified was not completed within the time fixed, nor at any time. Nevertheless, the contractors claimed in the court below that they were entitled to recover the contract price for the portion of the work which was actually done, and damages for the uncompleted portion, because, as they alleged, they had been prevented, by no fault of their own, but by freshets, ice and other force and violence of the elements from doing the work within the time stipulated, and had been prevented by the officers of the United States, without just cause and contrary to applicable provisions in the contract, from a subsequent completion of the work.

The material questions are determinable by a proper construction of the following clauses contained in the contracts:

"If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall,

in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part, or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party or parties (or either of them) of the second part, and upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States; provided, however, that if the party or parties of the second part shall, by freshets, ice or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

"The contractor must begin work within twenty days after notification that his bid has been accepted, unless hindered by high water; and within thirty days thereafter his working force must consist of at least 200 men, if working by hand, or the equivalent thereof in case excavating machines are used. If, at any time, the working force be reduced to 150 men or less, the engineer in charge shall have the right to terminate the contract; and in such case the retained percentage shall be forfeited to the United States.

"The contract will expire on the 31st day of December, 1886; but the right is reserved to annul the contract in January, 1886, in case forty per cent of the work covered by the same shall not have been completed on or before the 31st day of December, 1885. The annulment of the contract under the provisions of this paragraph will, however, involve no forfeiture of moneys previously earned."

While we are to determine the legal import of these provisions according to their own terms, it may be well to briefly recall certain well-settled rules in this branch of the law. One is that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none — nor, in such circumstances, can equity interpose. *Dermott* v. *Jones*, 2 Wall. 1; *Cutter* v. *Powell*, 2 Smith's Leading Cases, 1, 7th Amer. ed.

Another rule is, that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts. *Martinsburg & Potomac Railroad* v. *March*, 114 U. S. 549; *Chicago, Santa Fé &c. Railroad* v. *Price*, 138 U. S. 185.

We do not understand that these principles are now called into question, but their applicability is denied; and we are called upon to consider a very acute and ingenious argument, successfully urged in the court below, aiming to show that, in the present case, the controverted matter, to wit, whether the contractors were entitled to a further and additional extension of time, was not left to the determination of the engineer in charge of the work, but is open, under the language of the agreement and the facts as found, to be inquired into and determined by the court.

Opinion of the Court.

The material terms of the contract calling for construction are as follows:

"The said Gleason & Gosnell shall commence work under this contract on or before the twentieth day of August, 1885, and shall complete the same on or before the thirty-first day of December, 1886. . . . Provided, however, that if the party or parties of the second part shall, by freshets, ice or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion, as, in the judgment of the party of the first part or his successor shall be just and reasonable."

Passing by, for the present, the fact that several extensions of time were granted by the engineer, and having regard only for the above language, what does it mean? The construction put upon it by the court below was thus expressed:

"In the cases at bar the contracts in terms provide that 'additional time may in writing be allowed' for the completion of the work if prevented therefrom 'by freshets, ice or other force or violence of the elements' and by no fault of their own; not that such additional time may or may not be allowed as the engineer in charge may determine, but that 'such additional time may in writing be allowed' as in his judgment 'shall be just and reasonable.' The language, taken together, leaves no discretion in the officer except in respect of the additional time to be allowed, and even that, the contract provides, 'shall be just and reasonable.' The claimants in effect agreed that no additional time should be allowed them except on condition that they were prevented from the completion of the work (1) by freshets, ice or other force or violence of the elements, and (2) by no fault of their own; and to hold, when those conditions are present, that it is within the discretion of the engineer in charge to say whether any or no additional time may be allowed would be to eliminate that mutuality essential in conscionable contracts.

"Hence, taking into consideration the circumstances of this

case, and to effectuate the intention of the parties gathered from the contracts as a whole, we must hold that the word 'may' should be construed to mean 'shall.'

"As to what additional time would be just and reasonable he, as the engineer officer in charge, was to determine, not by the exercise of arbitrary power, but by the exercise of a just and reasonable judgment; and any additional time thus allowed would have been final."

We cannot accept this exposition of the language as sound. Rather do we interpret it to mean that, as between the United States and the contractors, the latter were to be relieved from their contract obligation to complete the work within the time limited, only if, in the judgment of the engineer in charge, their failure so to do was occasioned by freshets or other force of the elements, and by no fault of their own; and that, if and when, in his judgment, the failure to complete was, in point of fact, due to the extraneous causes, he was also to decide what additional time should be just and reasonable. In other words, the parties agreed that if the contractors should fail to complete their contract within the time stipulated, they should have the benefit of the judgment of the engineer as to whether such failure was the result of their own fault or of forces beyond their control, and, in the latter event, of his judgment as to what extension of time would be just and reasonable. Obviously the object of the provision in question was to prevent the very state of dispute and uncertainty which would be created if the present contention of the contractors were to prevail.

In support of its construction the court below points to a difference in the language between the clause respecting materials which provides that "the decision of the engineer officer in charge as to quantity and quality shall be final," and that used in the claim under consideration in which it is not said that the judgment of the engineer shall be final. But it is obvious that, from the very nature of the case, the decision of the engineer in the latter case must be final. The contract fixes the time within which the work must be completed, but provides that, in case failure to complete is providential and

without fault, such additional time may be allowed as the engineer may judge to be just and reasonable.

As, then, his granting of additional time would be final and irrevocable, so his refusal to allow it was necessarily final. The privilege of procuring an extension of time is conditional on the action of the officer, whether he grant or refuse it.

By changing the phrase "such additional time may be allowed" into the phrase "such additional time shall be allowed," the court below substituted for an appeal to the discretion and decision of the officer, an absolute right to have the question of prevention, whether by freshets or by fault, determined by the courts.

The fallacy of such reasoning is obvious; and is pointed out in the case of *Kihlberg* v. *United States*, 97 U. S. 398. That was a case of a contract between the United States and A, for the transportation by him of stores between certain points, provided that the distance should be ascertained and fixed by the chief quartermaster, and that A should be paid for the full quantity of stores delivered by him. It was not said in terms that the action of the chief quartermaster should be conclusive; and the distance, as ascertained and fixed by him, was less than the usual and customary route.

It was said by Mr. Justice Harlan, delivering the opinion of the court:

"The action of the chief quartermaster cannot, therefore, be subjected to the revisory power of the courts without doing violence to the plain words of the contract. Indeed, it is not at all certain that the government would have given its assent to any contract which did not confer upon one of its officers the authority in question. If the contract had not provided distinctly, and in advance of any services performed under it, for the ascertainment of distances upon which transportation was to be paid, disputes might constantly have arisen between the contractor and the government, resulting in vexatious and expensive, and to the contractor oftentimes, ruinous litigation. Hence the provision we have been considering. Be this supposition as it may, it is sufficient that the parties expressly agreed that distances should be ascertained and fixed by the

chief quartermaster, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government. The contract, being free from ambiguity, no exposition is allowable contrary to the express words of the instrument."

It was further suggested by the court below, and has been vigorously pressed upon us in the argument, that the engineer in charge was improperly influenced in refusing the third extension asked for, by a consideration of delinquencies in previous years, whereas it is claimed that the extended contracts were, in respect of their several dates, new contracts, the performance or non-performance of which did not depend upon anything done or omitted to be done thereunder prior to the last extension.

It may be that, by granting the previous extensions, the right of the Government to forfeit the compensation already earned and withheld under the terms of the contract was abandoned. But to say that the engineer in charge, when applied to for a third extension, may not take in view previous delinquencies and the futility of the extensions theretofore granted, seems to us quite unreasonable. He might well think that his duty to the Government and to the public interested in the early completion of the work forbade a further experiment in that direction. An indefinite succession of extensions was surely not within the contemplation of the contract. We do not wish to be understood to say that it would have been competent for the engineer in charge, if in his judgment the contractors had been duly diligent during the period of the last extension and had acted up to the conditions upon which such extension was granted, to have based his refusal for a further extension upon the *sole* ground that there had been delinquencies during the prior periods of extension. We mean merely to say that, in a *bona fide* exercise of the discretion conferred upon him, that officer might properly observe the conduct of the contractors through the entire scope of their past action, in deciding what weight to give to their promises as respected the future, and consider

whether previous grants of extension had brought forth such efforts on the part of the contractors as the circumstances required.

But was it at all the case that the engineer, in refusing the last application for further extension, based such refusal wholly upon a consideration of prior condoned delinquencies? Even if we cannot take notice of the affidavit of Major Stickney, contained in this record, in which he states that his refusal to grant a further extension was based upon the failure of the contractors to make proper provisions during the period of the last extension for carrying on their work, and that they had not fulfilled the conditions upon which the time had already been extended, we are permitted, and indeed required, in absence of evidence of bad faith on his part, to presume that he acted with due regard to his duty as between the government and the contractors.

The fallacy, as we think, in the position of the court below was in assuming that it was competent to go back of the judgment of the engineer, and to revise his action by the views of the court. This, we have seen, could only be done upon allegation and proof of bad faith, or of mistake or negligence so great, so gross, as to justify an inference of bad faith. But in this case we find neither allegation nor proof. The only allegation in the petition which can be pointed to bearing on this subject is as follows: "That on or about December, 1888, the said Major Amos Stickney refused to plaintiffs the extension of time which they requested, and to which they were rightfully entitled under the contract, by reason of being prevented from completing the same within the time limited by the last extension and renewal thereof, by freshets and by the force and violence of the elements and by no fault of their own, and by reason of damages and hindrances from causes within the control of the United States; and the plaintiffs were thereby prevented from completing the work. And the plaintiffs aver and charge that the said refusal of the said Stickney to extend the time for the completion of the contract was wrongful and unjust, and a breach of the contract."

In other words, the plaintiffs allege that they were pre-

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vented from completing their work by force and violence of the elements and not by any fault of their own, and that the judgment of the engineer in refusing an extension was therefore wrongful and unjust. But as they had agreed, in the contract as we have construed it, that the engineer was to decide whether the failure to complete was due to the force of the elements or to their fault, their allegation now is that the determination of the engineer was wrongful and unjust, because he decided the submitted issue against them. Of course, such an allegation was wholly insufficient on which to base an attempt to upset the judgment of the engineer.

But, even if we pass by the insufficiency of the allegation, we perceive no evidence, or finding based on evidence, which would have sustained a stronger and more adequate allegation. Indeed, no evidence whatever would appear to have been offered to sustain a charge of bad faith or gross mistake equivalent thereto. The court below does indeed say, in the twenty-first finding, that "no judgment or decision was given by said engineer on the question whether the claimants were prevented by freshets and force and violence of the elements during the season of 1888 from completing the work agreed upon within the period limited by the last extension of the contract, nor did he find or decide that the claimants were not so prevented." But, as it was expressly alleged in the petition, and was found by the court, that, on an application for a further extension because of interruption occasioned by force of elements and not by any fault of the plaintiff, the engineer did refuse to extend, the statement of the court must mean either that it was necessary for the engineer, in order to give efficacy to his decision, to declare in terms that it was based on a finding of fault on the part of the contractors, or that the conclusion of the engineer did not amount to a decision or judgment, within the meaning of the contract, because the court reached a different conclusion.

These are propositions of law and not of fact, and we cannot assent to either of them.

Without protracting the discussion, our conclusions are that, under a proper construction of the contracts in this case, the

right or privilege of the contractors, if they failed to complete their work within the time limited, to have a further extension or extensions of time, depended upon the judgment of the engineer in charge when applied to to grant such extension and that no allegation or finding is shown in this record sufficient to justify the court in setting aside the judgment of the engineer as having been rendered in bad faith, or in any dishonest disregard of the rights of the contracting parties.

These views lead to a reversal of the judgment of the court below in so far as it sustains the claim to recover damages for profits expected to inure to the plaintiffs if they had been permitted to complete the work.

As no actual damage or loss was definitely shown to have been suffered by the Government by reason of the non-completion of the work, and as no forfeitures were declared at the time of the several extensions, and may therefore be deemed to have been waived, we affirm that portion of the judgment of the court below allowing a recovery for the retained percentages of the compensation for work actually done and accepted.

Accordingly the judgment of the Court of Claims is hereby

Reversed and the cases are remitted to that court with directions to enter judgment in accordance with this opinion.

MR. JUSTICE HARLAN, MR. JUSTICE BROWN and MR. JUSTICE WHITE do not agree with the construction of the contract on the subject of the power of the engineer officer, and therefore dissent.